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Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

MARY E. GORECKI,

Petitioner,

v.

PHILIP D. CARLSON and THOMAS R. SMITH,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the legal standard for determining whether a public employee can be subjected to dismissal for political reasons, first enunciated in *Elrod* and then refined in *Branti*, is vague, uncertain and unworkable in practice, as demonstrated by the circuit conflicts, thus entitling Petitioner to qualified immunity from money damages liability.

PARTIES TO THE PROCEEDINGS

Respondents/Plaintiffs Phillip D. Carlson and Thomas R. Smith brought this action against the Petitioner/Defendant Mary E. Gorecki, Kane County State's Attorney. There are no other parties to these proceedings.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Carlson v. Gorecki*, 374 F.3d 461 (7th Cir. 2004) and is reprinted in the Appendix (App. 1-9). The opinion of the United States District Court for the Northern District of Illinois has not been reported. It is reprinted in the Appendix (App. 11-15).

JURISDICTIONAL STATEMENT

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The Court of Appeals for the Seventh Circuit entered judgment on June 29, 2004 (App. 1-9). Petitioner filed a Petition for Rehearing, which was denied on July 23, 2004 (App. 10). This Petition for a *Writ of Certiorari* was filed within 90 days of the denial of the Petition for Rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment I; United States Constitution, Amendment XIV, § 1; and 42 U.S.C. § 1983 are implicated in this case.

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction of the equal protection of the laws.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

> rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

A. Lower Court Proceedings

This case involves the termination of Plaintiffs as special investigators by Defendant Kane County, Illinois State's Attorney Mary Gorecki in December, 2000. Plaintiffs filed a two count second amended complaint alleging a First Amendment retaliation claim under 42 U.S.C. § 1983 and a state law defamation claim (App. 17-30). Defendant moved for summary judgment on the First Amendment claim on the basis of qualified immunity (App. 31-80, 184-319).

On March 12, 2003, the district court issued an opinion rejecting Defendant's qualified immunity defense and denying the motion for summary judgment (App. 11-15). Defendant timely appealed and, on June 29, 2004, the Seventh Circuit Court of Appeals affirmed the denial of summary judgment (App. 1-9). On July 23, 2004, the Court denied Defendant's petition for rehearing (App. 10). After mandate issued, the District Court stayed its proceedings pending resolution of this Petition. In granting the stay, the District Court expressly recognized the inter-circuit conflict on the issue of whether an investigator could be fired for political reasons.

B. Statement of Facts

Former Kane County State's Attorney David Akemann appointed Plaintiffs Carlson and Smith as his special

investigators in 1994 and 1999, respectively (App. 44-45, 81-82). In March 2000 Defendant Gorecki challenged Akemann in the Republican primary (App. 44, 81). Plaintiffs were friends with Akemann and actively supported his reelection campaign by advising him on political strategies and decisions, and joining him for political functions during lunchtime (App. 240-241, 276-278, 282, 296-298). Plaintiffs were also involved in assigning state's attorney employees to Akemann's political campaign functions (App. 242-243).

Defendant defeated Akemann in the primary and became a candidate in the November 2000 general election (App. 44, 81). During the ensuing campaign, Plaintiffs openly supported Defendant's Democratic opponent (App. 21). In October 2000, Plaintiff Smith authored and circulated a letter to the constituency of his township Republican Party criticizing Defendant's lack of experience, leadership, ethics, integrity and honesty, and stating that she was not "beyond reproach" (App. 21, 182-183). In November 2000, Defendant won the general election (App. 44, 81). Upon taking office on December 1, 2000, Defendant chose not to reappoint Plaintiffs as her special investigators and, instead, eliminated their positions entirely (App. 45, 82).[1]

Pursuant to Illinois statute, a state's attorney enjoys the authority to appoint special investigators to serve subpoenas, make return of process and conduct investigations which assist the state's attorney in the performance of her duties (App. 45, 72-76, 82). *See* 55 ILCS 5/3-9005(b) (West

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[1] For purposes of Defendant's qualified immunity defense only, Defendant admitted that she terminated Plaintiffs for political reasons, specifically their public support of Defendant's electoral opponents and public criticism of Defendant's reputation for honesty, integrity and competency to serve as the elected Kane County State's Attorney (App. 34).

2000). Special investigators may carry firearms with the permission of the state's attorney, and are peace officers who may exercise police powers. *Id.* Special investigators have all the powers possessed by investigators under the State's Attorneys Appellate Prosecutor's Act, including the power to investigate criminal cases for county state's attorneys. *Id.*; 725 ILCS 210/7.06 (West 2000).[2] Based on the above statutory powers and duties, a special investigator may provide direct input into prosecutorial decisions made by the state's attorney and his assistants, including whether to charge someone with a crime, whether to bring a case before a grand jury, or whether to continue an investigation further (App. 126-129, 185-187, 190-191, 228-238, 290-292).

Special investigators serve at the pleasure and discretion of the elected state's attorney (App. 188, 190, 286-287). A state's attorney has no duty to appoint or employ a special investigator at all (*Id.*). In addition, only the state's attorney has the power to appoint, remove and discipline a special investigator (*Id.*).

Former First Assistant State's Attorney John Barsanti testified that, in the early years at the State's Attorney's Office, there were very few investigators in the office, and they mainly served subpoenas (App. 106-107). However, after Akemann was elected, he changed that function and hired a private subpoena service so that special investigators only served "panic subpoenas" which freed up their time for other tasks (App. 110-111).

Although Plaintiffs provided trial support services to prosecutors (i.e., taking photos or finding witnesses) (App. 125-126), they also conducted criminal investigations

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[2] Plaintiffs' written job descriptions with the Kane County State's Attorney's Office mirrored the statutory duties outlined above (App. 45, 77, 82, 288).

under Akemann's administration (App. 187, 235-238). For example, Plaintiff Carlson was assigned to investigate allegations of official misconduct concerning the county coroner. He issued a report and recommendation which First Assistant Barsanti relied upon in deciding not to bring criminal charges (App. 185, 237-238). In addition, special investigators were assigned to special grand juries, interviewed witnesses in homicide and other criminal cases, and routinely investigated other criminal activity (App. 187, 235). Prosecutors relied upon input from special investigators in deciding whether to bring criminal charges (App. 185, 190-191).

While special investigators did not make policy for the office directly, (App. 120), they occasionally attended policy-making meetings with Akemann and his "supervisory crew", and provided reports and input on issues (App. 185, 188-189, 220-221). Investigations conducted by a special investigator were confidential, as were discussions with the state's attorney and/or his assistants concerning those investigations (App. 190-191, 292-293). Confidentiality was a necessity, because a state's attorney would not want to jeopardize the integrity of the investigation or any resultant prosecution (*Id.*).

With regard to investigations assigned by the elected state's attorney, the relationship between the elected state's attorney and his appointed special investigator is a close one (App. 190-191, 293). Inherent in the assignment is a level of trust because the state's attorney needs to know that the special investigator is providing truthful and accurate information (App. 190-191, 293-294). Consequently, although Akemann and Barsanti testified that political allegience was not required for special investigators to perform their jobs (App. 120), they conceded that an elected state's attorney would not appoint or keep a person in the position of special investigator who publicly supported or campaigned for his political opponent (App. 184-

185, 190-191, 295-296, 233-234). They likewise conceded that an elected state's attorney would not appoint or continue the employment of a special investigator who publicly criticized the elected state's attorney's reputation for honesty, competency and integrity (*Id.*).

REASONS FOR GRANTING THE WRIT

This case involves an issue of recurring importance concerning a newly elected public official's ability to terminate an employee for political reasons without offending the First Amendment. The federal circuit courts have unsuccessfully struggled to apply the standards enunciated by this Court in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507, 518 (1980). The result has been a conflicting and confusing array of decisions which leave public employers without any meaningful guidance and public employees without any accurate measure of the security of their positions. As discussed below, the instant case presents a striking illustration of this confusion as elected officials in some Circuits may terminate investigators who oppose them politically without risking personal liability, while officials in other Circuits, including the Seventh Circuit, allow officials to be sued for damages for terminating identically situated employees.

The Seventh Circuit's decision in the instant case has significantly weakened the viability of qualified immunity as a defense in political termination cases. Specifically, the court's decision that state's attorney's investigators may actively politic against an ultimately successful candidate without risking any employment consequences is in direct conflict not only with the decisions of sister circuits, but also with the Seventh Circuits's own decision in *Hernandez v. O'Malley*, 98 F.3d 293, 296 (7th Cir. 1996). Though highlighted by Petitioner below, and discussed during oral

argument, the lower court strangely made no mention of *Hernandez* in concluding that it was clearly established that State's Attorney's investigators did not occupy politically sensitive positions.

As a result of the denial of qualified immunity, public employers who misinterpret the confusing patchwork of circuit court decisions in assessing the First Amendment protections available for particular positions risk not only the potential reinstatement of terminated employees but also the risk of personal liability for money damages if that assessment turns out to be incorrect. Accordingly, there is an urgent need for this Court to revisit *Elrod* and *Branti*, and clarify both the standard governing political terminations under the First Amendment, and the role of qualified immunity in political termination cases.

I. *Elrod/Branti* Standard

In *Elrod*, this Court held that the First Amendment prohibits the firing of public employees on account of their political affiliation. 427 U.S. at 373. However, the Court recognized that political loyalty could justify dismissal of policymaking employees in order to ensure that "representative government [was] not . . . undercut by tactics obstructing the implementation of policies of the new administration." *Id.* at 367. Although the Court found that "[n]o clear line could be drawn between policymaking and nonpolicymaking positions," it set forth a number of relevant factors, including whether the person's job responsibilities were broad and not well defined, and whether the person acted as an advisor or formulator of

plans for implementation of broad goals. *Id.*[3]

In *Branti*, the Court reaffirmed that certain types of public positions remain properly subject to political considerations. However, the Court rejected *Elrod*'s categorical policymaking or confidential employee approach, and opined that "the ultimate inquiry is . . . .whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518. This standard drew sharp criticism from Justice Stewart in his dissent:

> A constitutional standard that is both uncertain in its application and impervious to legislative change will now control selection and removal of key governmental personnel. Federal judges will now be the final arbiters as to who federal, state and local governments may employ. In my view, the Court is not justified in removing decisions so essential to responsible and efficient governance from the discretion of legislative and executive officials.

Id. at 525. *See, generally*, Bhagwat, *Patronage and the First Amendment: A Structural Approach*, 56 U. CHI. L. REV. 1369, 1380 (Fall 1989) (commenting that *Branti*'s ambiguous standard undermines the capacity of local governments to hire and fire employees free of judicial intervention because it introduces uncertainty and threat of litigation into every employment decision).

Ten years after *Branti*, this Court extended the constitutional ban on patronage dismissals to other adverse

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[3] In concurrence, Justice Stewart narrowly interpreted the plurality's decision to only prohibit the patronage dismissal of nonpolicymaking, nonconfidential government employees. 427 U.S. at 375.

employment decisions, such as promotions, transfers, recalls and hirings. *See Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). Justice Scalia, joined by Chief Justice Rehnquist and Justices Kennedy and O'Connor, dissented and criticized the *Branti* standard as having "proved unworkable in practice." *Id.* at 110-111, (*citing*, Martin, *A Decade of Branti Decisions: A Government Officials' Guide to Patronage Dismissals*, 39 AM. U. L. REV. 11 (1989) (surveying inconsistent federal appellate court applications of *Branti*). Justice Scalia wrote that the various interpretations of *Branti* devised by the federal courts "are not only significantly at variance with each other; they are still so general that for most positions it is impossible to know whether party affiliation is a permissible requirement until a court renders its decision." *Id.* at 111. As a result, the federal courts "have produced inconsistent and unpredictable results." *Id.* at 112.[4]

Finally, this Court's most recent decision in this area, *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996), has led to further confusion, inconsistency, and uncertainty. In *O'Hare*, this Court extended *Elrod*'s First Amendment protection against political dismissal to independent contractors. Unlike *Elrod* and *Branti*, how-

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[4] Commentators since *Rutan* have continued to criticize *Branti*'s vague standard. One commentator recently stated that the "exceptions [to patronage dismissals have] resulted in the eruption of more than twenty years of inconsistent rulings by lower courts regarding which government positions entail policymaking and, more fundamentally, how best to approach that question." Berry, *Donkeys, Elephants, and Barney Fife: Are Deputy Sheriffs Policymakers Subject to Patronage Termination?*, 66 MO. L. REV. 667 (Summer 2001). Consequently, the federal circuits have created a "less-than-uniform legal landscape" on the issue of political dismissals. *Id.* at 673.

ever, *O'Hare* involved active political speech, in addition to mere political affiliation, as the basis for dismissal. The Court acknowledged that a "different, though related, inquiry" applied "where a government employer takes adverse action on account of an employee or service provider's right of free speech." 518 U.S. at 719. The Court stated that, while political affiliation cases under *Elrod* and *Branti* solely required an analysis of whether politics was an appropriate requirement for the position at issue, political speech cases required the more detailed, case-by-case balancing test under *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). This Court ultimately refused to grant an absolute right for governments to enforce patronage schemes over independent contractors, and remanded the case for the lower court to determine, based on the factual record, whether the case was governed by its *Elrod/Branti* rule or *Pickering*. 518 U.S. at 726.[5]

Unfortunately, this Court did not provide any guidance as to which test applies in cases, such as the instant case, which are intermixed with elements of political affiliation and overt political speech. "In practical application,. . . .the choice of analysis is not always clear." Gibson, *Rethinking the Sixth Circuit's Erosion of First Amendment Rights in Rose v. Stephens*, 72 U. CIN. L. REV. 767, 774 (Winter 2003). In situations involving dismissal based on both speech and political beliefs, there is substantial confusion as to whether the lower courts should use *Elrod/Branti* or *Pickering*, and this difficulty has led to varying results. *Id.*

Against that backdrop, a review of the circuit case law demonstrates that the confusion stemming from *Elrod* and

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[5] In a corollary case, the Court applied the *Pickering* balancing approach to the termination of a government contract based on pure political speech in *Bd. of County Commissioners v. Umbehr*, 518 U.S. 668 (1996).

Branti's vague standard has steadily increased over the years. Not only have the Circuit courts employed different approaches, they have generated inconsistent results relating to similar employment positions. At a minimum, the confused state of the law should have entitled Petitioner to qualified immunity in the instant case. Instead, Petitioner's "incorrect" decision made against the backdrop of the inconsistent case law has exposed her to costly litigation and potentially a personal damages judgment.

II. Inter-Circuit Conflict

In granting a stay of its proceedings, the district court recognized that there was an inter-circuit conflict as to whether state's attorney investigators could be fired for political reasons. Specifically, the lower court's decision directly conflicts with the Fifth Circuit's decision in *Gunaca v. State of Texas*, 65 F.3d 467 (5th Cir. 1995). In *Gunaca*, a newly elected county district attorney refused to reappoint an investigator who had supported the former district attorney. The Fifth Circuit held that it was not clearly established that firing the investigator violated the First Amendment. *Id.* at 475. The Court held that no case "had addressed an issue sufficiently analogous that a reasonable official would understand from its resolution that it was a First Amendment violation to dismiss or to not hire an investigator on the grounds that the investigator supported the campaign of the official's opponent." *Id.* The Court concluded that "[b]ecause reasonable public officials could have differed on the lawfulness of [the district attorney's] actions at the time they occurred, [he] was entitled to qualified immunity." *Id.*

Similarly, the lower court's decision conflicts with the Second Circuit's decision in *Danahy v. Buscaglia*, 134 F.3d 1185 (2d Cir. 1998). In *Danahy*, investigators with the state attorney general's office were fired for their political

affiliation with the prior attorney general. *Id.* at 1189. They were part of a statewide highly specialized prosecutor's office and were hired by and served at the pleasure of the attorney general. *Id.* at 1191. They worked closely with the prosecutors and dealt with highly confidential matters. *Id.* After measuring these facts against existing federal cases, the court held that the defendants could have reasonably perceived that the plaintiff investigators were policymaking or confidential employees. *Id.* at 1193. Therefore, the defendants were entitled to qualified immunity. *Id.*

In contrast to the Second and Fifth Circuits, the Tenth Circuit in *Laidley v. McClain*, 914 F.2d 1386, 1395 (10th Cir. 1990), *overruled on other grounds*, *Dodger's Bar & Grill, Inc. v. Johnson County Bd. of County Com'rs*, 32 F.3d 1436 (10th Cir. 1994), held that a newly elected district attorney was not entitled to qualified immunity for firing an investigator who had supported his opponent in the election. The plaintiff was an investigator in the child support division of the district attorney's office. Her duties included locating absent parents, serving process, sending letters, conducting interviews, contacting clients, and answering the telephone. Describing the investigator as "a low-level staff employee," the court held that the plaintiffs right to her job under *Elrod* and *Branti* was clearly established. *Id.*

Similarly, in *Bauer v. Montgomery*, 215 F.3d 656 (6th Cir. 2000), a former field investigator for the Ohio Attorney General claimed that he was terminated due to his political affiliation. The Sixth Circuit held that the investigator stated a cause of action. *Id.* at 661. The court reasoned that the inherent duties of the position, which included performing background investigations, corresponding with law enforcement, and interviewing witnesses, were not political. *Id.*

III. Intra-Circuit Conflict

The case law within the Seventh Circuit has similarly generated divergent results leaving both public employers and employees with no ability to determine how the investigator position will be treated in the future. In *Hudson v. Burke*, 913 F.2d 427 (7th Cir. 1990), the Seventh Circuit held that investigators for a city council finance committee could be lawfully fired based on their political affiliation. The Seventh Circuit interpreted *Branti*'s standard as focusing on the duties inherent in the office, and not the functions actually performed by the plaintiffs or their replacements. *Id.* at 431-432. The court stated that the relevant test was whether the position inherently authorized, either directly or indirectly, meaningful input into government decision making for which there was room for principled disagreement on goals or their implementation. *Id.* at 431. Given that the investigators served on a committee that made politically sensitive decisions, the court held that the investigators provided sufficient subjective input into policy decisions so as to justify their dismissal for political reasons. *Id.* at 432.

One year later, in *Matlock v. Barnes*, 932 F.2d 658 (7th Cir. 1991), the Seventh Circuit held that a city law department investigator could not be transferred to another position for political reasons because he was neither a policymaking nor confidential employee. The court held that the position's job duties, which mainly included handling small property claims and accident investigations, were too limited to qualify as policymaking. *Id.* at 664. The court found that the position did not have as much responsibility as other law enforcement personnel deemed to be policymakers, such as the assistant state's attorney in *Livas v. Petka*, 711 F.2d 798 (7th Cir. 1983), deputy sheriff in *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), and city attorney in *Ness v. Marshall*, 660 F.2d

517 (3rd Cir. 1981). *Id.* The court distinguished *Hudson* on the basis that the investigator position in that case involved input into political decisions. *Id.* The court also held that the mere ability to access confidential litigation files was insufficient to justify the dismissal on political grounds. *Id.* at 665.

Five years after *Matlock*, the Seventh Circuit in *Hernandez v. O'Malley*, 98 F.3d 293, 296 (7th Cir. 1996), held that a state's attorney was entitled to qualified immunity in a termination suit brought by a stenographer with investigator-like duties within a county state's attorney's office, because "both the law and its application to the facts are uncertain." *Id.* The court commented that "[a] regimen of case-by-case balancing makes it hard to dismiss complaints and simultaneously makes it hard to show that the right in question was 'clearly established.'" *Id.* The court found that the stenographer's duties were similar to the duties of both the city law department investigator in *Matlock* and the city finance committee investigators in *Hudson*. *Id.* at 296-297. In light of these conflicting decisions, the court concluded that the uncertainty of the law made it impossible for a state's attorney to determine with any confidence whether he was violating the First Amendment. *Id.* at 297. The court added:

> "drawing a stable line in *Elrod* [v. Burns, 427 U.S. 347 (1976)] cases has been difficult; even slight differences in the nature and context of the job can lead to opposite outcomes, as the contrast between *Matlock* and *Hudson* shows vividly. Contextual balancing tests should be worked out prospectively, rather than at the expense of public officials who guess wrong about future legal developments."

Id. at 297.

In the instant case, the lower court failed to heed its own warning to work out the *Elrod* and *Branti* analysis pro-

spectively rather than on the financial backs of elected officials. The court distinguished *Hudson* on its facts and found that Respondents' positions were analogous to the position in *Matlock*. Without any discussion of *Hernandez*, however, the court incredulously held that the law had been clearly established under *Matlock*. *See Carlson*, 374 F.3d at 466. Contrary to the Seventh Circuit's finding, a reasonable official in Petitioner's shoes could not have possibly discerned after reading *Hudson* and *Matlock*, and then *Hernandez*, that the law regarding the political dismissal of a state's attorney special investigator was clearly established in December of 2000.

Furthermore, the lower court in the instant case materially modified its application of the *Branti* standard without any prior warning. Previously, the Seventh Circuit had consistently focused on the duties inherent in the office at issue, rather than the functions actually performed by a particular person. *See Tomczak v. City of Chicago*, 765 F.2d 633, 641 (7th Cir. 1985); *Meeks v. Grimes*, 779 F.2d 417, 420, fn. 1 (7th Cir. 1985). The inquiry had been whether the powers inherent in the office carried with them the potential for making or participating in discretionary decisions or encompassing a confidential relationship to the policymaker. *Hernandez*, 98 F.3d at 296; *Tomczak*, 765 F.2d at 642. However, in the instant case, the Seventh Circuit held that the inquiry "considers both the historical treatment of the position and the actual work performed by the people who hold the position." *Carlson*, 374 F.3d at 464-65.

Thus, while it is true that a special investigator is authorized by statute and job description to serve subpoenas and make return of process (App. 45, 72-76, 82), it is equally true that a special investigator is authorized by statute and job description to conduct investigations with full police powers which assist the state's attorney in the

performance of her duties (*Id.*). *See* 55 ILCS 5/3-9005(b) (West 1995). Had the Seventh Circuit focused on the inherent duties of the position, instead of abruptly changing its legal analysis to an "actual duties" test, it would have found that the special investigator position has the inherent ability to provide meaningful input into prosecutorial decisions, and that the position required confidentiality and a close working relationship with the elected state's attorney.

This was the approach previously taken by the Seventh Circuit in *Livas*, 711 F.2d 798, 800 (7th Cir. 1983) (assistant state's attorney), and *Upton*, 930 F.2d 1209 (7th Cir. 1991) (sheriff's deputy). Both cases upheld the political dismissals without any factual analysis of the duties actually performed by the persons who held the positions. In *Livas* the court found that a state's attorney exercises broad public responsibilities in the performance of his duties and enjoys broad discretion to set whatever policies he believes are necessary to protect societal interests, and, therefore, the state's attorney was entitled to demand absolute loyalty from his assistants who implement those policies. 711 F.2d at 801. In *Upton*, the court found that a deputy sheriff inherently enjoyed wide discretion and latitude in implementing the sheriff's basic policies and, among other things, was "expected to provide the Sheriff with truthful, accurate and beneficial information which he needs to make decisions and administer his office." 930 F.2d at 1215. Thus, a sheriff could understandably believe that political loyalty was an appropriate job requirement, especially since one of the plaintiffs in that case "took a high profile in a hotly contested campaign" and actively opposed the newly elected sheriff. *Id.* at 1216.

Furthermore, like the situation in *Livas* and *Upton*, a newly elected state's attorney enjoys the statutory power to appoint her own special investigators, or not to appoint

any special investigators at all. *See* 55 ILCS 5/3-9005(b) (West 1998). The Seventh Circuit ignored its own precedent which stated that political affiliation is both permissible and desirable for positions which are appointed directly by elected public officials. *See Heck v. City of Freeport*, 985 F.2d 305, 310 (7th Cir. 1993); *Wolf v. City of Fitchburg*, 870 F.2d 1327, 1331 (7th Cir. 1989).

The above discussion demonstrates that the Seventh Circuit has applied the *Elrod/Branti* standard in an inconsistent fashion, and that, as a result, inconsistent rulings have emerged with regard to similar positions. In its interpretation and application of *Elrod* and *Branti*, the Seventh Circuit has muddied the waters and made it impossible for elected officials in Illinois to determine with confidence whether a particular employment decision violates the First Amendment.

IV. The Circuit Courts Have Struggled Unsuccessfully to Reach a Uniform, Workable Approach to the *Elrod/Branti* Standard

The intra-circuit and inter-circuit conflicts discussed above are an unavoidable consequence of the vagueness inherent in the *Elrod* and *Branti* formulation. With nothing but a vague standard to guide them, the circuits have adopted widely varying approaches in determining what positions are politically protected, which have led, not surprisingly, to inconsistent results.

The First Circuit examines whether the position at issue relates to partisan interests or concerns. *Fuentes v. Gaztambide*, 807 F.2d 236, 241 (1st Dist. 1986). The First Circuit employs a two-pronged analysis: (1) whether the position involves government decision making on issues where there is room for political disagreement on goals or their implementation; and, (2) whether the particular

responsibilities of the position resembles a policymaker, privy to confidential information, a communicator, or some other function such that political affiliation is an appropriate requirement. *Id.* at 241-242; *Rosenberg v. City of Everett*, 328 F.3d 12, 17-18 (1st Cir. 2003).

The Second and Fourth Circuits interpret the *Branti* standard to mean that political affiliation is an appropriate requirement of a position when there is a rational connection between shared ideology and job performance. *Vona v. Co. of Niagra*, 119 F.3d 201, 207 (2nd Cir. 1997); *Jenkins v. Medford*, 119 F.3d 1156, 1161 (4th Cir. 1997). In the Second District, "[i]f political loyalty is reasonably connected to performance of the inherent duties of the office, then that office is not protected from patronage dismissals." *Vona*, 119 F.3d at 207. Similarly, the Fourth Circuit initially inquires into whether the position relates to partisan political interests, and then, if so, the court examines the particular responsibilities of the position. *See Jenkins*, 119 F.3d at 1162.

The Third Circuit employs a highly factual and contextual "special scrutiny standard." *See Boyle v. County of Allegheny*, 139 F.3d 386, 396 (3rd Cir. 1998). While acknowledging that neither *Elrod* nor *Branti* provided explicit guidance in the practical application of the standard, the Third Circuit has embraced this vagueness, commenting that "[t]he the lack of explicit guidance . . . results in a greater flexibility on the part of lower courts to determine each case under its own facts and in its own context." *Id.* In the Third Circuit's view, this flexible standard serves the employer, who may use political affiliation where its interest is overriding and of vital importance, while at the same time protecting the First Amendment rights of the employee. *Id.*

The Fifth Circuit generally follows the *Connick/Pickering*[6] test and balances the First Amendment rights of the employee with the rights of the employer in providing loyal and efficient government services. *See Gentry v. Lowndes County*, 337 F.3d 481, 485-486 (5th Cir. 2003); *McBee v. Jim Hogg County*, 730 F.2d 1009, 1014 (5th Cir. 1984). On one end of the spectrum, if an employee is fired based solely on his private political views, no balancing takes place, and the employee will usually prevail. *Gentry*, 337 F.3d at 486; *McBee*, 730 F.2d at 1014. On the other end of the spectrum are those employees whose political speech is so destructive that "the exercise of his constitutional privileges clearly overbalanced his usefulness as an [employee]." *Gentry*, 337 F.3d at 486 (*quoting*, *Ferguson v. Thomas*, 430 F.2d 852, 859 (5th Cir. 1970)). The "mid-spectrum" cases, i.e., political association combined with some political speech, are examined under *Connick/Pickering*, whereby the court weighs the public concerns implicated by the employee's speech against the significance of maintaining a close or confidential working relationship with the employer. *Gentry*, 337 F.3d at 486. Thus, if the employee occupies a confidential or policymaking role, the employer's interests will more likely outweigh the employee's First Amendment rights. *Id.*

The Sixth Circuit examines both the inherent duties of the position at issue and the duties that the new holder of the position will perform. *Bauer v. Montgomery*, 215 F.3d 656, 660 (6th Cir. 2000). The Sixth Circuit inquires into "the position as envisioned by the newly elected official, rather than the tasks that had previously been performed by the plaintiff, because the official must be permitted to

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[6] Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

reorganize the staff." *Id.* In addition, the Sixth Circuit has "identified four categories of positions which presumptively fall into the *Branti* exception." *Id.* In doing so, the Sixth Circuit has disagreed with the First and Second Circuits which had rejected a categorical approach to applying the *Branti* exception. *See McCloud v. Testa*, 97 F.3d 1536, 1557 (6th Cir. 1996).

As previously discussed, the Seventh Circuit inquires whether the position inherently authorized, either directly or indirectly, meaningful input into government decision making for which was room for principled disagreement on goals or their implementation. *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981). The court utilizes a functional approach and examines the powers and duties inherent in the position, which now apparently includes consideration of the historical treatment of the position and the actual work performed by the people who hold the position. *Carlson*, 374 F.3d at 464-465. In addition, the Seventh Circuit treats political speech cases, as opposed to mere political affiliation or belief, as an exception to the *Connick/Pickering* balancing test. *See Warzon v. Drew*, 60 F.3d 1234, 1238 (7th Cir. 1995); *Wilbur v. Mahan*, 3 F.3d 214, 215 (7th Cir. 1993).

The Eighth Circuit has acknowledged that there have been many tests employed by the various circuits for determining whether a position is excepted under *Branti*, and that the case law has generated inconsistent and unpredictable results. *Billingsley v. St. Louis County*, 70 F.3d 61, 63 (8th Cir. 1995). The Eighth Circuit has stated that a person who performs technical, ministerial tasks is protected from patronage dismissal, but a person in a confidential position is not. *Id.* The Eighth Circuit has conceded that there are no clear guidelines for the broad range of positions in between. *Id.*

The Ninth Circuit holds that the employee's status as a policy-maker or confidential employee is dispositive, and

the *Connick/Pickering* balancing test does not apply under circumstances where the employee can be so classified. *Diruzza v. County of Tehama*, 206 F.3d 1304, 1308 (9th Cir. 2000). The Ninth Circuit focuses on whether political loyalty is appropriate for the effective performance of the job based on the actual, not the possible, duties performed by the employee. *Id.* at 1310.

The Tenth Circuit holds that where a public employer has taken action based on an employee's political association or beliefs, the *Elrod/Branti* analysis applies. *Jantzen v. Hawkins*, 188 F.3d 1247, 1251 (10th Cir. 1999). If the action is taken because of an employee's speech, then *Connick/Pickering* applies. *Id.* In applying *Elrod/Branti*, the Tenth Circuit focuses on both the inherent powers of the position and the actual duties performed. *Id.* at 1253. The Eleventh Circuit likewise distinguishes between pure political association or belief cases, to which *Elrod/Branti* applies, and political speech cases, to which *Connick/Pickering* applies. *McKinely v. Kaplan*, 262 F.3d 1146, 1149, fn.4 (11th Cir. 2001).

The manner in which each federal circuit implements its respective test also varies. Some of the Circuits apply factors to determine the nature of the employee's duties, while others do not. While there are minor variations between them, the First, Second, and Ninth Circuits consult largely the same factors.[7] *Ortiz-Pinero v Rivera-*

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[7] In the First Circuit, these factors are relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders. *Fuentes v. Gaztambide*, 807 F.2d 236, 242 (1st Cir. 1985 (*en banc*). Although the First Circuit considers whether the state civil service statutes give the position a particular classification, *Ortiz-Pinero v. Rivera-Arroya*,

(continued...)

Arroyo, 84 F.3d 7, 12 (1st Cir. 1996); *Butler v. N.Y. State Dept. of Law*, 211 F.3d 739, 744 (2nd Cir. 2000); *Diruzza*, 206 F.3d at 1310. The Third Circuit and Fifth Circuits each consider different factors. *Boyle v. County of Allegheny*, 139 F.3d 386, 396-97 (3rd Cir. 1998);[8] *Gentry v. Lowndes Co.*, 337 F.3d 481, 486 (5th Cir. 2003).[9] There is no indication that any of the other Circuits consult a preordained list of factors.

The circuits also employ a variety of different presumptions and rules. The Sixth Circuit employs a "tie-breaking" rule referred to as the "*Rice* canon", which provides that the *Branti* exception is to be applied broadly, so as to encompass positions considered by the legislature to be

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[7] (...continued)
84 F.3d 7, 16 (1st Cir. 1996), the Second Circuit has explicitly included it as one of the factors. *Butler v. N.Y. State Dept. of Law*, 211 F.3d 739, 744 (2nd Cir. 2000). The Ninth Circuit considers the additional factor of whether the job possesses "vague or broad responsibilities." *Diruzza*, 206 F.3d at 1310. The Ninth Circuit also applies an entirely different set of factors to positions determined to be "confidential" in nature rather than "policymaking." *See Hobler v. Brueher*, 325 F.3d 1145, 1154 (9th Cir. 2003).

[8] The Third Circuit considers whether the employee is a nonpolicymaking, nonconfidential employee, whether party affiliation is highly likely to effect an official's ability to carry out his duties, whether the employee has meaningful input into decision making concerning the nature and scope of a major program, and whether the employee acts as an advisor or formulates plans for the implementation of broad goals. *Boyle*, 139 F.3d at 396-97.

[9] These factors are the political sensitivity of the employment, the nature and content of the employee's speech or political activity, the extent of public concern implicated by the speech, and whether close confidential working relations with elected officials are necessary. *Gentry*, 337 F.3d at 486.

outside of the merit civil service. *McCloud v. Testa*, 97 F.3d 1536, 1551 (6th Cir. 1996). The Tenth Circuit uses a "close call" rule, in which close cases are to favor the employee. *Snyder v. City of Moab*, 354 F.3d 1179, 1188-89 (10th Cir. 2003). Finally, the Circuits also differ on whether the determination that a position is within the protection of *Elrod/Branti* is one of fact or law.[10]

The different applications of *Elrod/Branti* is particularly troublesome since circuit and lower courts routinely look to other circuits who have already decided whether the particular position before them is within the *Elrod/Branti* exception. *See Hobler v. Brueher*, 325 F.3d 1145, 1153 (9th Cir. 2003) (examining decisions of the First and Sixth Circuits regarding a secretary's protection within *Elrod/Branti*); *Jenkins v. Medford*, 119 F.3d 1156, 1163 (4th Cir. 1997) (examining case law of the Seventh and Eleventh Circuit to determine that deputy sheriffs were not protected positions); *Diruzza v. County of Tehama*, 206 F.3d 1304, 1311-12 (9th Cir. 2000) (the Ninth Circuit examines decisions of six other Circuits regarding deputy sheriffs, noting the 3-3 split among them).

Defendant understands that the analysis is largely factual and dependant on a variety of factors, particularly

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[10] *Compare Rosenberg v. City of Everett*, 328 F.3d 12, 18 (1st Cir. 2003) (whether or not a position is subject to political discharge is a legal question for the courts) and *Cushman v. Villiage of Ilion*, 317 F. Supp.2d 120, 126 (N.D.N.Y. 2004) (whether a person is a policymaker is a question of constitutional law for the court), *citing to Gordon v. County of Rockland*, 110 F. 3d 886, 888-889 (2nd Cir. 1997), *with Boyle v. County of Allegheny*, 139 F.3d 386, 397 (3rd Cir. 1998) (whether an employee falls within the *Elrod/Branti* exception is generally one of fact) and *Snyder v. City of Moab*, 354 F.3d 1179, 1185 (10th Cir. 2003) (whether political association is an appropriate requirement for a position is generally one of fact). *See also Hobler v. Brueher*, 325 F.3d 1145, 1150 (9th Cir. 2003) (mixed question of law of fact).

the nature of the government office and the duties of the employee. A bright-line rule may, therefore, be impractical if not impossible. *See Elrod*, 427 U.S. at 367 (no clear line can be drawn between policymaker and non-policymaker positions). However, this is precisely the difficulty faced by *every* public official *each* time she must make an employment decision where despite her attempts to abide by the law, shared political ideology and confidence are desired or necessary for the operation of her office. The Court should, therefore, exercise its resources in favor of granting certiorari in order to resolve these conflicts, and provide more guidance to public officials across the country.

Defendant advocates the approach taken by the Fifth Circuit. By balancing the interests of the employee and employer based on a spectrum of whether the employee was fired for mere political belief or active speech, the Fifth Circuit's approach lends more certainty to the analysis especially with regard to employees whose position may be protected under the First Amendment, but whose active speech is so disruptive that the employer should be able to terminate the employee without violating the Constitution.

V. *Application of Qualified Immunity Principles*

The above discussion clearly shows that the Seventh Circuit erred in denying Petitioner's qualified immunity defense. It is well-settled that a public official is immune from personal damages liability so long as her actions do not violate the clearly established constitutional rights of others. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The right must be clearly established in relation to the specific context confronting the public official when she acted, not as a broad general proposition. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001). Although it is not necessary that prior case law be "on all fours" to be clearly established,

the case law must give the public official fair warning that her conduct in the present factual situation is unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 740-41 (2002); *Cavalieri v. Shepard*, 321 F.3d 616, 622 (7th Cir. 2003), *cert. denied* by 124 S.Ct. 531 (2003). A public official is entitled to qualified immunity if, at the time she acted, the law did not clearly establish that she was prevented from firing an employee *who held the particular position at issue. See Wrigley v. Greanias*, 842 F.2d 955, 958 (7th Cir.1988); *Larson v. Cantrell*, 974 F. Supp. 1211, 1217 (N.D. Ind. 1997); *West v. Phillips*, 883 F. Supp. 308, 319, fn. 11 (S. D. Ind. 1994) (emphasis added).

In the instant case, there was no U.S. Supreme Court or Seventh Circuit case which clearly established in December of 2000 that an Illinois state's attorney special investigator, who actively opposed the candidacy of, and spoke out critically against the newly elected state's attorney, could not be fired for political reasons. Furthermore, the case law involving the investigator positions generally, both within the Seventh Circuit and in other circuits, was anything but obvious in warning Defendant that her actions were unconstitutional. Thus, the Seventh Circuit erred in denying Defendant's qualified immunity defense.

CONCLUSION

For the foregoing reasons, Petitioner Mary E. Gorecki respectfully submits that the Petition for a *Writ of Certiorari* should be granted.

Respectfully submitted,

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(2)

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

In the
Supreme Court of the United States

MARY E. GORECKI,

Petitioner,

v.

PHILIP D. CARLSON and THOMAS R. SMITH,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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In the
United States Court of Appeals
For the Seventh Circuit

No. 03-1732
PHILLIP D. CARLSON and THOMAS R. SMITH,
Plaintiffs-Appellees,

v.

MARY E. GORECKI,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 01 CV 9235—**Charles R. Norgle, Sr.**, *Judge.*

ARGUED APRIL 15, 2004—DECIDED JUNE 29, 2004

Before FLAUM, *Chief Judge*, and MANION and ROVNER, *Circuit Judges.*

MANION, *Circuit Judge.* Phillip Carlson and Thomas Smith worked as special investigators for the Kane County, Illinois, State's Attorney's office. In December 2000, defendant Mary Gorecki, the Kane County State's Attorney, fired Carlson and Smith allegedly because of their speech on matters of public concern, namely, their support of Gorecki's opponent in the election and their allegations that Gorecki was involved in various jobs-for-favors and kickback schemes. Carlson and Smith filed this action under 42 U.S.C. § 1983, asserting that Gorecki's decision to fire them violated the First Amendment. After discovery, Gorecki filed a motion for summary judgment asserting that Carlson and Smith occupied policymaking

or confidential positions and that she was entitled to qualified immunity. The court denied Gorecki's motion. She appeals, and for the following reasons, we affirm.

I.

Both Phillip Carlson and Thomas Smith were hired as special investigators by the former Kane County State's Attorney, David Akemann. As investigators, both Carlson and Smith were routinely called upon, for example, to locate witnesses, serve subpoenas, transport witnesses to court, and interview witnesses. Both were supervised by an Assistant State's Attorney, John Barsanti. Beginning in 1986, Barsanti supervised investigators in the Kane County State's Attorneys' office. According to Barsanti, the main duty of Carlson and Smith was serving subpoenas. Both Barsanti and former State's Attorney Akemann testified that political affiliation did not matter to the investigator position. The evidence presented shows that neither Carlson nor Smith participated in the policymaking decisions of the office, and that political affiliation was not regarded as important to the job of investigator. Barsanti emphasized that the investigators were not given discretion in performing their jobs, but that on the rare occasions that the investigators were asked to "investigate" matters, they were instead given specific tasks to accomplish, such as taking a photograph of a building.

Gorecki won the election and replaced Akemann as Kane County State's Attorney. On her first day at work as state's attorney in December, 2000, she fired[1] Carlson after

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[1] Gorecki maintains that the position of special investigator, a statutory appointment by the state's attorney, runs concurrently

(continued...)

he had been on the job for four years and Smith after he had been on the job for two years. For purposes of this appeal, it is undisputed that Gorecki fired Carlson and Smith because she viewed them as her political enemies and blamed them for an attempt to smear her politically. Carlson and Smith supported Gorecki's opponent in the primary election, and Gorecki blamed Carlson for exposing information regarding Gorecki's alleged involvement in kickback and jobs-for-favors schemes prior to taking office.[2] Gorecki similarly blamed Smith for authoring and circulating a letter criticizing her during the election for Kane County State's Attorney. According to Gorecki, despite the fact that she shared the same party affiliation as Carlson and Smith, they were her "political enemies."

After Carlson and Smith were fired, they filed this § 1983 suit against Gorecki alleging a First Amendment violation. Gorecki filed a motion for summary judgment on the grounds of qualified immunity, arguing that Carlson

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[1] (...continued)
with the tenure of the appointing state's attorney. Thus, according to Gorecki, she did not fire Carlson and Smith, but merely refused to reappoint them as special investigators. Gorecki does acknowledge, however, that regardless of her statutory argument, "holdover" situations are possible. The plaintiffs claim that they were holdover employees and were fired by Gorecki on December 1, 2000. This factual dispute is immaterial because *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 79 (1990), prohibits hiring, as well as firing, based on political affiliation when political affiliation is not appropriate for effective performance of the job. For ease of reference, we will regard the plaintiffs as fired from their jobs.

[2] The exposure of this information led to the Illinois bar authorities' decision to suspend Gorecki from the practice of law for a period of four months in 2003 due to statements she made in violation of the Rules of Professional Conduct. *See In re Gorecki*, No. 96299, 2003 WL 22725624 (Ill. Nov. 20, 2003).

and Smith were policymakers or confidential employees. Gorecki admits that she fired Carlson and Smith solely for political reasons, i.e., their public support of her opponent and public criticism of her reputation for honesty. The court granted Carlson and Smith the right to take limited discovery before it ruled on the motion. Carlson and Smith deposed Barsanti, the First Assistant State's Attorney, and Akemann, the former State's Attorney.

Gorecki, in support of her argument that the plaintiffs were policymakers or confidential employees, relied on the evidence that investigators serve at the pleasure and discretion of the state's attorney and that statute provides that the state's attorney has the sole power to appoint, remove, and discipline a special investigator. The state's attorney is also permitted by statute to assign a special investigator to investigate civil, criminal, and administrative matters and serve as an agent of the grand jury. Of course, any investigation conducted by the special investigator is considered confidential, as are any conversations between the special investigator and the state's attorney or supervising assistant state's attorney. Likewise, the assignment involves a position of trust. The court, however, denied Gorecki's motion for summary judgment by finding that there were material issues of fact in dispute concerning whether the job of special investigator is a policymaking or confidential position.

II.

We review de novo the district court's decision to deny Gorecki's motion for summary judgment on qualified immunity grounds. *Beauchamp v. City of Noblesville*, 320 F.3d 733, 742 (7th Cir. 2003). We start with the general proposition that public employees may not be made to suffer adverse job actions because of their political beliefs. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 79 (1990);

Elrod v. Burns, 427 U.S. 347 (1976). An exception to this general rule is permitted when the government employee responsible for the adverse action can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved. *See, e.g.*, *Branti v. Finkel*, 445 U.S. 507, 517-18 (1980).

Traditionally, we have referred to this exception for ease of reference as the "policymaking" or "confidential" employee exception because those terms fit the majority of situations where the exception applies. *See Hudson v. Burke*, 913 F.2d 427, 431 (7th Cir. 1990). The ultimate inquiry, however, is not a search for whether the job fits the appropriate label "policymaker" or "confidential," but whether party affiliation is an appropriate requirement for performing the job. *See Thompson v. Illinois Dept. of Professional Regulations*, 300 F.3d 750, 755-56 (7th Cir. 2002). Whether party affiliation is an appropriate requirement for performance of the job is determined by a functional test that examines the powers and duties inherent in the position. *See Hudson*, 913 F.2d at 431. This inquiry considers both the historical treatment of the position and the actual work performed by the people who hold the position. *See id.* at 433; *Flenner v. Sheahan*, 107 F.3d 459, 465 (7th Cir. 1997); *Thornburg v. Peters*, 155 F. Supp. 2d 984, 990-91 (C.D. Ill. 2001).

At the outset, Gorecki errs by focusing solely on whether the special investigator position fits within the "policymaker" or "confidential" labels. She ignores the broader and determinative question of whether party or political affiliation is an appropriate requirement for the job. *See Thompson*, 300 F.3d at 755-56. In fact, there is sufficient evidence in the record to defeat Gorecki's motion for summary judgment, including Barsanti's deposition, indicating that political affiliation was not important to the job. Gorecki's reliance on *Hudson* is misplaced, because there

we found that the plaintiff investigators who were fired by the City of Chicago contributed to controversial political decisions made by the politically charged city finance committee. *See Hudson*, 913 F.2d at 433. In *Hudson*, we found that the investigator position was inherently political in nature and involved investigators who were hired primarily due to their political affiliation. *Id.* at 432 ("Political affiliation was a primary reason [plaintiffs] were hired; all performed political work."). Here, in contrast, there is sufficient evidence for a jury to reject Gorecki's claim that the special investigator position contributed to political decisions or that the holders of the office were hired primarily due to their political affiliation.

Gorecki's decision to entirely eliminate the special investigator position after firing Carlson and Smith also makes it difficult for Gorecki to establish that political affiliation is important to the job. *Compare id.* at 433 (considering the job responsibilities of those who replaced the plaintiff investigators who were fired). In addition, the government official in *Hudson* testified that he envisioned an expanded role for the investigator position, including additional investigatory duties involving sensitive political information. *See id.* In contrast, Gorecki has failed to submit evidence that the investigators handled sensitive political information or even that she intended to use the job for that purpose in the future. It is possible to infer from Gorecki's decision to eliminate the special investigator position not only that it was a non-patronage job, but also that the position was not important at all for the functioning of the office.

Turning to Gorecki's focus on the policymaking and confidential monikers, as stated, we look both to the historical treatment of the job and to the work performed by those who presently hold the position to determine the inherent nature of the job. *See id.*; *Flenner*, 107 F.3d at 465;

Thornburg, 155 F. Supp. 2d at 990-991. Much if not most of the evidence in the record reveals that the position involved almost exclusively ministerial functions such as locating witnesses, serving subpoenas, transporting witnesses to court, and interviewing witnesses. The special investigators had little, if any, direct contact with the state's attorney and were instead supervised by an assistant state's attorney. The state's attorney's office was not a small, intimate setting, but instead had over 30 assistant state's attorneys, in addition to various staff members. *But see Matlock v. Burns*, 932 F.2d 658, 665 (7th Cir. 1991) (acknowledging that at least in a small office setting, political animosity can be a legitimate basis for firing by an elected official forced to have constant, direct contact with a person viewed as a political enemy).

Gorecki's evidence, at best, shows that the position has the potential to impact policy. This is unhelpful, because all jobs under the authority of the state's attorney have this potential, depending upon how the state's attorney uses the position. The special investigator position, like any other job at the state's attorney office, requires a certain degree of confidentiality. Access to confidential information alone, however, does not mean that the job is confidential for purposes of applying the confidential employee exception to the ban on patronage dismissals. *See id.* at 665. Access to confidential files by a lower-level employee who, while not a policymaker, is openly politically hostile, may be reason for termination. However, as stated, the potential, speculative uses of the position are not significant in this case because we are construing the facts in the light most favorable to the plaintiffs, and because Gorecki has eliminated the position without submitting any evidence that she will resurrect it with a political focus.

Finally, based on this record, Gorecki is not entitled to qualified immunity. The cloak of qualified immunity is re-

moved from a government official if the plaintiffs show that the law prohibiting the government official's conduct was "clearly established." *Gregorich v. Lund*, 54 F.3d 410, 413 (7th Cir. 1995). The test for whether the law was clearly established must be conducted based on the specific facts of the case, and not at a high level of generality. *See Greenberg v. Kmetko*, 922 F.2d 382, 383-84 (7th Cir. 1991).

Here, the plaintiffs have met their burden because this case is remarkably analogous to *Matlock*, 932 F.2d at 662. In *Matlock*, we held that a City of Gary, Indiana, law department investigator with the primary duties of investigating claims by visiting accident sites, interviewing witnesses, taking pictures, and preparing written recommendations was not a policymaker or confidential employee. *Matlock*, 932 F.2d at 664.

Based on the record, Carlson and Smith had less discretion and responsibility than the legal investigator in *Matlock*. As far as we know from the summary judgment record, the main duties of Carlson and Smith were ministerial functions such as locating witnesses, serving subpoenas, transporting witnesses to court, and interviewing witnesses. On the rare occasions that they were required to submit a report, the report was merely factual and did not contain recommendations. In *Matlock*, we rejected the government's arguments that the investigator was a policymaker because he exercised a great deal of discretion in how he carried out investigations, and we also rejected the claim that the position was confidential because the investigator had unlimited access to confidential files. *See id.* at 662. Essentially, Gorecki is making the same argument here. Her claim of qualified immunity fails because the record shows that Carlson and Smith had jobs involving functions more ministerial than the functions of the investigator in *Matlock*. *See Upton v. Thompson*, 930 F.2d 1209, 1213 (7th Cir. 1991) (holding that a strictly menial government

worker is clearly and completely protected from patronage firing). The special investigator position in Kane County was menial to such an extent that, after the firing of Carlson and Smith, the position was entirely eliminated.

In closing, we emphasize the limited nature of our holding that is dictated by the specific and somewhat limited facts of this record. A state's attorney is clearly not prohibited from utilizing the position of special investigator as a policymaker or confidant so as to make political affiliation an appropriate consideration for the job. Here, the defendant has presented no evidence that the positions the two plaintiffs held rose to a level requiring political sensitivity. The nonessential quality of these jobs is underscored by the fact that Gorecki saw no need to fill the vacancies created.

III.

The district court properly denied Gorecki's motion for summary judgment. Gorecki has failed to submit sufficient evidence for us to conclude as a matter of law that party affiliation is an appropriate requirement for the special investigator position. Instead, substantial evidence shows that the position involves primarily ministerial tasks such as locating witnesses, serving subpoenas, transporting witnesses to court, and interviewing witnesses. Carlson and Smith have met their burden of identifying closely analogous case law prohibiting a very similar political firing of a legal investigator, and Gorecki is thus not entitled to qualified immunity. For these reasons, we AFFIRM the decision of the district court.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 23, 2004

Before

Hon. Joel M. Flaurn, *Chief Judge*
Hon. Daniel A. Manion, *Circuit Judge*
Hon. Ilana Diamond Rovner, *Circuit Judge*

No. 03-1732

Phillip D. Carlson and Thomas Smith *Plaintiffs-Appellees,*	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
v.	)	
Mary E. Gorecki, *Defendant-Appellant.*	)	No. 01 C 9235
	)	**Charles R. Norgle, Sr.,** Judge.

ORDER

On consideration of the petition for rehearing en bane filed by defendant-appellant, no judge in active service has requested a vote on the petition for rehearing en bane, and all of the judges on the original panel have voted to deny rehearing. The petition is therefore DENIED.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Defendant's Motion for Summary Judgement

Carlson and Smith

v.

Case Number 01 C 9235
Charles Norgle, Judge

Gorecki

■ [Other Docket entry] Before the Court if Defendant's Motion for Summary Judgment [18-1]. For the following reasons, Defendant's motion is denied.

■ [For further detail see order on reverse side of the orginial minute order.]

Dated 3/12/2003

Plaintiffs, Phillip D. Carlson and'Chomas R. Smith, two former Special Investigators for the Kane County State's Attorney Office, bring this action for retaliation in violation of the First and Fourteenth Amendment of the United States Constitution. Defendant, Mary 1W. Gorecki, currently the State's Attorney of Kane County, Illinois, was elected on November 7, 2000. Prior to winning the election, Plaintiffs publicly spoke out against Defendant's qualifications for the position and supported Defendant's opponent. It is also alleged that Plaintiffs were involved in activities which lead to an Attorney Registration and Disciplinary Committee ("A.R.D.C.") investigation of Defendant regarding her involvement in an illegal jobs-for-favors scheme. Defendant's law license was later suspended as a result of this investigation. On December 1, 2000, Defendant terminated Plaintiffs employment on her first day in office. Defendant now moves for Summary Judgment based on the defense of qualified immunity.

Summary judgment is permissible when "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)- The court views the record and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party. Fed. R Civ. P. 56(c), see also. Perdomo v. Browner, 67 F.3d 140, 144 (7th Cir.1995). "In the light must favorable" simply means that sunintaryjudgment is not appropriate ifthe court must make "a choice of inferences." See United States v. Diebold. Inc., 369 U.S- 654, 655 (1962), see also, First Nat'l Bank of Arizona v. Cities Service Co., 391 U.S. 253, 280 (1968); Wolf v. Buss (America) Inc., 77 F.3d 914, 922 (7th Cir- 1996). The choice between reasonable inferences from facts is ajury function. Sec Anderson v. Liberty Lobby. Inc, 477 U.S. 242, 255 (1986).

Individual government officials sued under § 1983 may assert the defense of qualified immunity. See generally Saucier v. Katz, 533 l!-S. 194 (2001). Qualified immunity is a

two-step analysis. See id. at 2156. The first step is to determine if there is a constitutional violation present on the facts alleged, when construed most favorably to the party asserting the injury. See Saucier, 533 U.S. 194 at 201. If the plaintiff presents a constitutional injury, the second step is to determine whether the right was clearly established at the time. See id. 1-he second step "must be undertaken in light of the specific context of the case, not as a general proposition...." Id. "[T]he right allegedly violated must be defined at an appropriate level of specificity before a court can determine if it was clearly established." Id. at 202 (quoting Wilson v. Layne, 526 U.S. 603, 615 (1999). "The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular [official] conduct... Saucier. 121 S. Ct at 2158. "If the [official's] mistake as to what the law requires is reasonable ... the [official] is entitled to the immunity defense." [d. Saucier demands that the court specifically define the constitutional inquiry according to the facts of' the case, and construe facts and inferences in favor ofthe plaintiff. See 121 S. C't at 2156; McNair, 279 F-3d at 465-66.

After reviewing the parties' briefs and supporting documents. the court finds that summary judgment is inappropriate. The question ofwheihcr Plaintiffs' received a constitutional injury depends upon the inherent nature ofthe position ofState's Attorney Special Investigator. See Iiudson v. l3ttrke, 913 F.2d 427, 43 1 (7th Cir. 1990). The test is "whether party affiliation is an appropriate requirement for the effective performance of the office involved." Branti v. Finkel, 445 U.S. 520, 518 (1980); Hudson, 913 F.2d at 431. Specifically, the focus should be on the duties inherent in the office or position, not the particular functions performed by a particular member of the office. Hudson, 913 F.2d at 431- "The First Amendment prevents the governnment, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and

associate Rutan V. Republican Party of Illinois, 110 S.Ct. 2729. 2738 (1990); Wainscott v. Henry, 3 15 F.3d 844, 854 (7th Cir. 2003).

Here, Defendant claims she did not violate Plaintiffs' First and Fourteenth Amendment rights by terminating their employment. Sec Del-.'s Reply Mem- in Supp. of its Mot. for Sunma. J. at 4-5- Defendant argues that the record supports file notion that the position of Special Investigator is inherently a policymaking or confidential position requiring political loyalty. jd Defendant also claims that the position nI Special Investigator can significantly impact policy decisions within the Office of the State's Attorney. dg . at 4. The court, however, is not convinced that tine record supports Defendant's position. Drawing all reasonable inferences in the light most favorable to Plaintiffs, a reasonable jury could infer otherwise. See Fed. R. Civ. P. 56(c).

Furthermore, even if Defendant's contention is true, there is enough evidence in the record for a reasonable jury to infer that Defendant tired Plaintiffs not for the governmental reasons related to the inherently political nature of the position of Special Investigator, but for reasons of political retaliation. See Branti, 445 U.S. at 517 n.12. To show retaliation, Plaintiffs must establish a "chronology of events from which retaliation can be inferred.' Black v. Lane, 22 F.3d 1395, 1399 (7th Cir. 1994) (quotations and citations omitted). Here, Plaintiffs have shown that Defendant was well aware of the fact that while she was campaigning, Plaintiff Smith circulated a letter publicly questioning Defendant's qualifications for the position. Del.'s Mot. for Sunun. J., Ex. A at 9,1(!j 34-35. This alone is enough to raise a genuine issue of material fact sufficient to deny Defendant's motion. See Myers v. Ilasara, 226 Fad. 821, 828 (7th Cir. 2000). Additionally, a question exists regarding whether or not, prior to Plaintiff's' dismissal, Defendant blamed Plaintiff Carlson for her troubles with the A.R.D.C. Sec Pl.'s Resp. to Def.'s Mot. for Suntan. J., Ex. 6 at 144. Again, drawing all

reasonable inferences in favor of I'Iuinlifl's, the court cannot say as a matter of law that Defendant did not terminate Plaintiffs' employment for retaliatory reasons. Therefore, the court need not go any further with its analysis.

For the reasons stated above, Defendant's Motion for Summary Judgement is denied.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Carlson and Smith

v.

Case Number 01 C 9235

Charles R. Norgle, Judge

Gorecki

■ [Other Docket entry] Before the Court if Defendant's Motion for Summary Judgment [18-1]. For the following reasons, Defendant's motion is denied.

Dated 9/10/2004

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Phillip D. Carlson and Thomas Smith *Plaintiffs,*	)	No. 01 C 9235
v.	)	**Charles R. Norgle, Sr.,** Judge Presiding.
Mary E. Gorecki, Defendant.	)	JURY REMANDED.

SECOND AMENDED COMPLAINT

Now comes the Plaintiffs, PHILLIP D. CARLSON and THOMAS R. SMITH, Plaintiffs, by and through their attorneys, John P. De Rose and Associates, and complain of Defendant Mary E. GORECKI, and in support thereof state as follows:

JURISDICTION

1. That this action is brought pursuant to 29 U.S.C. § 623, the Civil Rights Act of 1871, 42 U.S.C. § 1983, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, the Constitution of the United States of America, and the State of Illinois Constitution. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1331 and 1343 and its jurisdiction over pendent state law claims.

PARTIES

2. That Plaintiff, PHILLIP D. CARLSON, (hereinafter sometimes referred to as "Plaintiff Carlson"), is a resident of the State of Illinois and a citizen of the United States of America.

3. That Plaintiff, THOMAS R. SMITH, (hereinafter sometimes referred to as "Plaintiff Smith"), is a resident of the State of Illinois and a citizen of the United States of America.

4. That Defendant Mary E. GORECKI was at all times hereinafter mentioned acting under state law as the State's Attorney of the County of Kane.

FACTS

5. That Plaintiff Carlson was hired to be an investigatorfor the Kane County State's Attorney's Office in April 1996.

6. That Plaintiff Smith was hired to be an investigator for the Kane County State's Attorney's Office in August 1999.

7. That prior to his hiring, Plaintiff Smith had over thirty (30) years experience in investigative and law enforcement work for the Cook County Sheriffs Police's.

8. That prior to his hiring, Plaintiff Carlson had over twelve (12) years experience in investigative work for the Illinois Secretary of State's Office.

9. That prior to Defendant Mary E. Gorecki's assumption of the Kane County State's Attorney's Office, Plaintiffs had always enjoyed the highest professional reputations as investigators and law enforcement officers for the State's Attorney's Office.

10. That during the primary campaign for the Office of Kane County State's Attorney, evidence came to light of

potential wrongdoing by Defendant Mary E. Gorecki as a candidate for the position of State's Attorney.

11. That in or about June 1999 Plaintiff Carlson discovered that Defendant Mary E. Gorecki had been circulating false and politically damaging election materials concerning the Honorable James T. Doyle, a sitting judge and candidate for retention to the Sixteenth Judicial District.

12. That speaking out on a matter of public concern that Kane County be served by an honest and competent judiciary, Plaintiff Carlson advised Judge Doyle that the source of the false and politically damaging election materials was Defendant Mary E. Gorecki.

13. That shortly thereafter, Judge Doyle confronted Defendant Mary E. Gorecki about the false and politically damaging election materials, and she admitted that she was involved in the distribution of the materials.

14. That during the confrontation, Defendant Mary E. Gorecki was advised that Judge Doyle had learned of her involvement from PlaintiffCarlson.

15. That thereafter, in retaliation for having exposed her involvement, Defendant Mary E. Gorecki started a systematic attack on the integrity and honesty of Plaintiff Carlson.

16. That prior to and after becoming Kane County State's Attorney Defendant Mary E. Gorecki falsely accused Plaintiff Carlson of threatening her mother's job and made public and false statements that Plaintiff Carlson was unskilled, unqualified and uncertified as a peace officer.

17. That in February 2000 Defendant Mary E. Gorecki left a series of tape recorded messages to Deputy Sheriff

Jane Morrison offering to get a job for Ms. Morrison's husband in the Kane County Highway Department in exchange for campaign contributions to certain Kane County officials and an additional ten to fifteen (10% to 15%) of the first year's salary realized for such a job.

18. That on March 2, 2000 the tape recordings and allegations that Gorecki talked to Morrison about a kickback surfaced just weeks before the Republican primary in which Defendant Mary E. Gorecki was challenging incumbent David Akemann for the office of State's Attorney of Kane County.

19. That Defendant Mary E. Gorecki initially denied that it was her voice on the tape recordings.

20. That on March 21, 2000 Defendant Mary E. Gorecki won the primary election for the Republican nomination for the office of Kane County State's Attorney.

21. That prior to Defendant Mary E. Gorecki becoming Kane County State's Attorney, she falsely identified Plaintiff Carlson of being the individual involved in a kickback scheme for jobs in Kane County.

22. That on or about September 1, 2000 Defendant Mary E. Gorecki publicly admitted to leaving the taped messages.

23. That Defendant Mary E. Gorecki later publicly admitted that she had talked to Morrison about a county job, claimed it was a joke, and denied talk of a kick back.

24. That State's Attorney Akemann requested that a Special Prosecutor be appointed to investigate the allegations of wrongdoing by Defendant Mary E. Gorecki.

25. That on or about September 8, 2000 Kane County Chief Judge Grant Wegner appointed Daniel D. Doyle, a

former judge from Rockford to investigate the allegations of wrongdoing by Defendant Mary E. Gorecki.

26. That the investigation by the Special Prosecutor found cause for and did forward the results of his investigation to the Attorney Registration and Disciplinary Commission.

27. That Defendant Mary E. Gorecki falsely and publicly stated that she had been exonerated of any wrongdoing through investigations conducted by the Federal Bureau of Investigation, the Illinois Attorney General's Office, and Appellate Court Prosecutor's Office, and Special Prosecutor Daniel D. Doyle.

28. That these false and public statements were reported widely throughout Kane County print and electronic media,

29. That, as a matter of fact, the Attorney Registration and Disciplinary Commission filed a formal complaint against Defendant Mary E. Gorecki alleging that she had violated professional rules of conduct when she left the tape recorded messages.

30. That in or about October 2000, Plaintiff Smith, a duly elected Township Precinct Committeeman of the Republican Party, in an exercise of free speech on a matter of public concern that Kane County be served by an honest and competent chief law enforcement officer, authored and circulated a letter to his constituency indicating his concern for the credibility and fitness of Defendant Mary E. Gorecki to hold the office of Kane County State's Attorney.

31. That during the election campaign, Plaintiffs Carlson and Smith, in an exercise of free speech on a matter of public concern, openly expressed their support for the candidate opposed to Defendant Mary E. Gorecki in the State's Attorney's race.

32. That on November 7, 2000 Defendant Mary E. Gorecki defeated Robert Steffen in the Kane County State's Attorney's race.

33. That on December 1, 2000, on her first day in office, Defendant Mary E. Gorecki called a meeting with Plaintiffs.

34. That during that meeting, Plaintiff Thomas R. Smith presented Defendant Mary E. Gorecki with a copy of the letter that he had authored and circulated to his constituency.

35. Plaintiff Smith advised Defendant Mary E. Gorecki that he did not want her to learn of the document from any other source but him and pledged to her that he would continue to serve the State's Attorney's Office and the citizens of Kane County with honesty, integrity, and professionalism as a member of the State's Attorney's investigator staff.

36. That at that meeting in which other members of her campaign staff were in attendance, Defendant Mary E. Gorecki summarily dismissed and discharged Plaintiffs from their positions as investigators for the Kane County State's Attorney's Office.

37. That said dismissals and discharge were in retaliation for Plaintiffs having spoken out on matters of public concern regarding the integrity and competency of Defendant Mary E. Gorecki to serve as Kane County State's Attorney and the perception by Defendant Mary E. Gorecki that Plaintiffs "whistleblew" to law enforcement agencies and the Attorney Registration and Disciplinary Commission about her alleged wrongdoing.

38. That Defendant Mary E. Gorecki, in an attempt to embarrass Plaintiffs, had them unceremoniously escorted from the building.

39. That following their open expressions of speech on matters of public concern to the Kane County community as aforesaid, Plaintiffs were terminated as investigators with the Kane County State's Attorney's Office on December 1, 2000.

CAUSES OF ACTION

COUNT I

Retaliation in Violation of First and Fourteenth Amendment

1-39. Plaintiffs re-allege Paragraphs I through 39 of this Second Amended Complaint as Paragraphs 1 through 39 of Count I as though fully set forth herein.

40. That Kane County has a custom and policy of using governmental power as an instrument of oppression to suppress employees from expressing their beliefs and/or opinions on matters of public concern.

41. That prior to and immediately after assuming the Office of Kane County State's Attorney, and in an attempt to retaliate against Plaintiffs for their exercise of free speech on a matter of public concern, Defendant Mary E. Gorecki made public statements that Plaintiffs were dismissed because they were unqualified.

42. That prior to and after becoming Kane County State's Attorney, Defendant Mary E. Gorecki further falsely stated that Plaintiffs had not completed the Police Training Institute Program, a 400 hour training regimen required of sworn police officers, a statement that she knew to be false or about which she had a reckless disregard for the truth.

43. That prior to and after becoming Kane County State's Attorney, Defendant Mary E. Gorecki harassed Plaintiff Carlson and besmirch his good name and reputation by falsely accusing him of theft of Kane County property and equipment.

44. That because of the false statements made by Defendant Mary E. Gorecki in retaliation of their exercise of free speech on a matter of public concern, Plaintiffs suffered irreparable harm to their personal and professional reputations.

45. That although the job performance of and by Plaintiffs sufficiently met the legitimate expectations of Kane County, their employment was terminated without cause, justification or prior warning, by Gorecki when she became Kane County State's Attorney

46. That Plaintiffs spoke out on matters of public concern, to wit:

    a) the need for honesty and integrity of candidates for public office in Kane County; and

    b) the honesty and integrity of Defendant Mary E. Gorecki to serve as the chief law enforcement officer of Kane County.

47. That Plaintiffs strongly opposed, in public meetings and/or written communications to their constituency, the candidacy of Defendant Mary E. Gorecki because of her public statements of denial and later admission of involvement in a kick back scheme.

48. That Plaintiffs criticized Defendant Mary E. Gorecki for reportedly using her "influence" to guarantee employment with a public entity in exchange for financial kickback.

49. That Defendant Mary E. Gorecki made public statements critical of Plaintiffs and contended that they were not fit and properly credentialed to be investigators for the Kane County State's Attorney's Office.

50. That Plaintiffs' interest in acting as responsible citizens, and in speaking out on the actions described

above support their claims to constitutional protection of their First Amendment freedom of speech.

51. That Plaintiffs were engaged in conduct protected by the First Amendment.

52. That as a result of the previously mentioned acts, Defendant Mary E. Gorecki, acting under color of state law as the agent of County of Kane, has deprived and continues to deprive Plaintiffs of their rights under the First Amendment of the United States Constitution and the Illinois Constitution in violation of 42 U.S.C. § 1983.

53. That the acts of Defendant Mary E. Gorecki were and are the proximate cause of injury and damage to Plaintiffs.

54. That the action taken by Defendant Mary E. Gorecki to terminate Plaintiffs for their right of free expression irreparably harmed Plaintiffs.

55. That Defendant Mary E. Gorecki has acted and continues to act with malice, willfulness, and callous and reckless indifference to the rights of Plaintiffs. 56. That the actions of Defendant Mary E. Gorecki were taken with deliberate oppression and were taken willfully or with such gross negligence as to indicate wanton disregard for the rights of Plaintiffs.

57. That the actions of Defendant Mary E. Gorecki were the result of a vindictive campaign to terminate Plaintiffs in violation of their First Amendment rights to speak out on matters of public concern..

58. That Defendant Mary E. Gorecki possesses the final decision making power of the Kane County State's Attorney's Office with respect to the hiring and firing of personnel.

59. That the actions of Defendant Mary E. Gorecki were actions taken in a spiteful effort to get rid of Plaintiffs

for reasons wholly unrelated to any legitimate state objective.

60. That Plaintiffs were not policy-making or confidential employees.

61. That political fidelity is not a bona-fide criterion to performing the duties of special investigator.

62. That Plaintiff's position required little or no contact with the State's Attorney and job assignments were initiated by the several Assistant State's Attorney in the office who also oversaw the day to day activities of the investigators.

63. That Defendant Mary E. Gorecki did, in fact, deprive Plaintiffs of their rights by terminating their employment in retaliation for Plaintiffs' speech on matters of public concern.

64. That actions of Defendant Mary E. Gorecki in terminating Plaintiffs are likely to chill the exercise of constitutionally protected speech of others in a comparable position.

65. That Plaintiffs' employment was terminated without cause or justification or prior warning.

66. That Defendant Mary E. Gorecki was aware of Plaintiffs' activities in furtherance of public policy.

67. That no reasonable cause or justification existed to discharge Plaintiffs from their employment.

68. That by wrongfully discharging Plaintiffs without cause or justification, and for retaliatory reasons set forth above, Defendant Mary E. Gorecki acted willfully and with malice toward Plaintiffs.

69. That as a direct and proximate result of the wrongful and unlawful termination, Plaintiffs have suffered the loss of their employment, the loss of their salary and

benefits, and damage to their reputation and future earning potential.

WHEREFORE, Plaintiffs, PHILLIP D. CARLSON and THOMAS R. SMITH respectfully pray for Judgment for each of them and against Defendant Mary E. Gorecki as follows:

A. compensatory damages in the amount of one million dollars ($1,000,000.00) for each of them, including wages and benefits lost as a result of their respective wrongful termination;

B. punitive damages in the amount of one million dollars ($1,000,000.00) for each of them and against Defendant Mary E. Gorecki;

C. the costs of this suit;

D. reasonable attorney's fees as permitted by 42 U.S.C. § 1988; and

E. such other relief as may be proper and just.

Count II
Defamation

1-69. Plaintiffs re-allege Paragraphs 1 through 69 of this Second Amended Complaint as Paragraphs 1 through 69 of Count H as though fully set forth herein.

70. That at the time of the commission by Defendant Mary E. Gorecki of the grievances hereinabove mentioned, and for a long time prior thereto, Plaintiffs were employed as investigators in the Kane County State's Attorneys Office.

71. That it was the job responsibility of Plaintiffs to investigate and report violations of the criminal law where ever they discovered them.

72. That Plaintiffs have always conducted themselves in

said employment with efficiency, honesty and punctuality.

73. That Plaintiffs were always deservedly held in high esteem by members of the Kane County State's Attorney's Office, by the citizens of Kane County, and by all those persons with whom they had dealings as investigators for the State's Attorneys Office.

74. That the Plaintiffs held their positions with the Kane County State's Attorneys Office for the maintenance and support of themselves and their families.

75. That on or about December 5, 2000, at Geneva, Kane County, Illinois well knowing the premises but maliciously and wickedly contriving and intending to injure and destroy Plaintiffs' good names, credit and reputations in their employment and bring them into disgrace among the members of the State's Attorney's Office, the members of the law enforcement community, and the citizens of Kane County with whom Plaintiffs had dealings, and to cause Plaintiffs to be regarded as persons unfit and unworthy to perform the duties of their employment, to prejudice and injure Plaintiffs in their employment, and to cause them the loss of their employment, Defendant Mary E. Gorecki falsely, maliciously and wrongfully made false, defamatory, and slanderous statements about them and their abilities and credentials to act as investigators for the Kane County State's attorney's Office.

76. That prior to and after Defendant Mary E. Gorecki became Kane County State's Attorney, she stated publicly and to the press that Plaintiffs were unqualified and unfit to perform their jobs.

77. That prior to and after Defendant Mary E. Gorecki became Kane County State's Attorney, she stated publicly and to the press that Plaintiff Carlson had committed a crime by participating in an illegal

"kick-back" scheme in order to secure jobs for various persons.

78. That prior to and after Defendant Mary E. Gorecki became Kane County State's Attorney, stated publicly and to the press that Plaintiff Smith obtained his job only through nefarious and corrupt political deals.

79. That Defendant Mary E. Gorecki stated publicly and to the press, "I have terminated two investigators from the employ of the Kane County State's Attorneys Office. Investigators Phil Carlson and T.R. Smith did not complete the Police Training Institute Program, a 400 hour training regimen".

80. That Defendant Mary E. Gorecki stated publicly and to the press that Plaintiff Carlson had committed a crime by stealing government property and stealing tires from Sam's Club.

81. That Defendant Mary E. Gorecki's defamatory remarks made after she became State's Attorney were not in any way justified or within the realm of any legitimate duty and were only uttered to retaliate against Plaintiffs and to mislead and misdirect authorities away from her own culpability.

82. That said false, defamatory, and slanderous statements were reported widely in the local press and were read by citizens of the Kane County community, by reason of which Plaintiffs were and are greatly injured in their good names, credit, and reputations and have suffered the loss of their employment.

WHEREFORE, Plaintiffs, PHILLIP D. CARLSON and THOMAS R. SMITH respectfully pray for Judgment for each of them and against Defendant Mary E. Gorecki and each of them as follows:

A. compensatory damages in the amount of one million dollars ($1,000,000.00) for each of them, including

wages and benefits lost as a result of their respective wrongful termination;

B. punitive damages in the amount of one million dollars ($1,000,000.00) for each of them and against Defendant Mary E. Gorecki; C. the costs of this suit; and

D. such other relief as may be proper and just.

Respectfully submitted,

/s/ John P. DeRose
John P. DeRose and Associates
15 Spinning Wheel Road Suite 328
Hinsdale, Illinois 60521 (630) 920-1111

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Phillip D. Carlson and Thomas Smith *Plaintiffs,*	)	No. 01 C 9235
v.	)	**Charles R. Norgle, Sr.,** Judge Presiding.
Mary E. Gorecki, *Defendants.*	)	

NOW COMES the Defendant, MARY E. GORECKI, by and througkher attorneys, JAMES G. SOTOS and MICHAEL D. BERSANI of HERVAS, SOTOS, CONDON & BERSANI, P.C., and pursuant to Fed. R. Civ. P. 56(b), moves this Court fojudgment with respect to Plaintiffs' Second Amended Complaint.

In support of this motion, Defendant states the following:

1. Plaintiffs Phillip D. Carlson and Thomas R. Smith have filed a two-count First Amended Complaint for money damages pursuant to 42 U.S.C. § 1983 and Illinois common law against Defendant Mary E. Gorecki in her individual capacity as Kane County State's Attorney.

2. In Count I, Plaintiffs have alleged a Section 1983 First Amendment political retaliation claim stemming from Defendant's decision not to reappoint Plaintiffs as Special Investigators in the Kane County State's Attorney's Office.

3. In Count II, Plaintiffs allege a state law defamation

claim in connection with statements that Defendant allegedly made in conjunction with Plaintiffs' employment and
Defendant's decision not to reappoint Plaintiffs.

4. Summary judgment should be granted as to Count I because Plaintiffs occupied policymaking or confidential positions for which political loyalty was an appropriate job requirement. Therefore, Defendant did not violate Plaintiffs' First Amendment rights. Alternatively, it was not clearly established that Plaintiffs occupied positions for which political loyalty was an appropriate job requirement and, therefore, Defendant is entitled to qualified immunity.

5. If this Court grants summary judgment as to Plaintiffs' federal claim, it should relinquish supplemental jurisdiction over Plaintiffs' state law defamation claim.

6. Pursuant to Local Rule 56.1(a), Defendant has served and filed a memorandum of law, statement of undisputed material facts and supporting evidentiary material.

WHEREFORE, Defendant, MARY E. GORECKI, respectfully requests that this Court enter summary judgment as to Plaintiffs' First Amended Complaint pursuant to Fed. R. Civ. P. 56.

/s/ MICHAEL D. BERSANI,
One of the Attorneys for the Defendant

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Phillip D. Carlson and Thomas Smith *Plaintiffs-Appellees,*	)	No. 01 C 9235
v.	)	**Charles R. Norgle, Sr.,** Judge Presiding.
Mary E. Gorecki, Defendant-Appellant.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT GORECKI'S MOTION FOR SUMMARY JUDGMENT

PREFATORY REMARKS

Plaintiffs Phillip D. Carlson and Thomas R. Smith have filed a two-count Second Amended Complaint for money damages pursuant to 42 U.S.C. § 1983 and Illinois common law against Defendant Mary E. Gorecki in her individual capacity as Kane County State's Attorney. Plaintiffs have alleged a Section 1983 First Amendment political retaliation claim in Count I and a state law defamation claim in Count II.

In alleging their First Amendment claim, Plaintiffs contend that they were terminated from their employment as Special Investigators in retaliation for their political activities. Specifically, Plaintiffs contend that they openly supported Defendant's predecessor in the Republican primary and her Democratic opponent in the general election campaign for Kane County State's Attorney (Sec.

Am. Compl., 13 1). Plaintiffs also contend that they publicly criticized Defendant's honesty, integrity and competency to serve as State's Attorney (Sec. Am. Compl., 30, 36-37, 39, 46-48, 50-51).

Defendant has moved for summary judgment as to the Section 1983 political retaliation claim because Defendant is entitled to qualified immunity. In moving for summary judgment, Defendant admits for purposes of her qualified immunity defense only that she failed to reappoint Plaintiffs based on their political affiliation and activities. In addition, should this Court dismiss the federal claim it should relinquish supplemental jurisdiction over Plaintiffs' state law defamation claim. This memorandum of law is submitted in support of Defendant's motion for summary judgment.

ARGUMENT

I. SUMMARY JUDGMENT SHOULD BE GRANTED AS TO COUNT I ALLEGING POLITICAL RETALIATION UNDER THE DOCTRINE OF QUALIFIED IMMUNITY

A. Principles of Qualified Immunity

A public official is immune from personal damages liability so long as her actions do not violate clearly -established constitutional rights of others. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). "[Q]ualified immunity is intended to provide government officials with the ability to `reasonably anticipate when their conduct may give rise to liability for damages."' Anderson v. Creighton, 483 U.S. 635, 646 (1987) (quoting Davis v. Scherer, 468 U.S. 183, 195 (1984)). Qualified immunity provides "`ample room for mistaken judgments' by protecting `all but the plainly incompetent or those who knowingly violate the law."'

Hunter v. Bryant, 502 U.S. 224, 229 (1991) (quoting Malley v. Briaas, 475 U.S. 335, 341 (1986)).

The doctrine of qualified immunity is not only an immunity from damages liability; it is an immunity from the costs associated with defending a damages suit. Saucier v. Katz, 121 S.Ct. 2151, 2156 (2001); Crawford-El v. Britton, 523 U.S. 574, 589 (1998). In order to fulfill the policy objective of protecting public officials from the burdens of civil litigation as well as civil damages, qualified immunity should be resolved at the earliest possible stage of litigation. Saucier, Id. Once a case erroneously proceeds into discovery, the immunity may already be diminished; thus the federal courts must be vigilant to ensure that a plaintiff has set forth some plausible basis for recovery before allowing a civil rights lawsuit against a governmental official to proceed into discovery. See Siegert v. Gilley, 500 U.S. 226, 232-33 (1991).

To defeat a claim of qualified immunity, a plaintiff bears the burden of satisfying a twostep inquiry: (1) did the official's conduct violate the plaintiff's constitutional rights; and, if so, (2) was that constitutional right clearly established at the time of the alleged misconduct? Siegert, 500 U.S. at 231-32 (1991). A plaintiff must show that the constitutional principles at stake were clearly established in relation to the specific facts confronting the public official when she acted. Rakovich v. Wade, 850 F.2d 1180, 1209 (7th Cir. 1988) (en banc), cert. denied, 488 U.S. 968 (1988); see also Auriemma v. Rice, 895 F.2d 338, 343 (7th Cir. 1990) (generalized discussion of equal protection clause insufficient to overcome government official's qualified immunity). In order to satisfy this burden, a plaintiff must identify a closely analogous case which has already established "both the right at issue and its application to the factual situation at hand." Erwin v. Daley, 92 F.3d 521, 525 (7th Cir. 1996).

The availability of qualified immunity in political retaliation cases is broad. A public official is entitled to

qualified immunity if, at the time she acted, the law did not clearly establish that she was prevented from firing an employee who held the particular position at issue. See Wrigley v. Greanias, 842 F.2d 955, 958 (7th Cir. 1988).

B. Defendant Did Not Violate Plaintiffs' First Amendment Rights Because Plaintiffs Occupied Policymaking Or Confidential Positions And Therefore Could Be Lawfully Terminated For Political Reasons

In general, a government employee cannot be fired based on his political beliefs. See Branti v. Finkel, 445 U.S. 507, 517 (1980); Elrod v. Burns, 427 U.S. 347,373 (1976). However, a recognized exception exists for an employee who occupies a confidential or policymaking position for which political affiliation is "an appropriate requirement for the effective performance of the public office involved." Branti, 445 U.S. at 518. The purpose behind this exception is to ensure that newly elected officials be able to implement the policies for which they were elected without interference by disloyal employees. Pleva v. Norcluist, 195 F.3d 905, 911 (7th Cir. 1999).

The exception to the ban on patronage dismissals extends beyond mere political affiliation. Public employees who occupy an office having a confidential character or policymaking function, or some other characteristic for which political affiliation is an appropriate job requirement, may be fired for speaking out against their employers or criticizing their employers' policies. See Warzon v. Drew, 60 F.3d 1234, 1238 (7th Cir. 1995); Wilbur v. Mahan, 3 F.3d 214, 215 (7th Cir. 1993). "The concern driving the policymaking exception `is with the effects on the operations of government of forcing a public official to hire, or retain, in a confidential or policymaking job, persons who are not [her]

political friends and may be [her] political enemies.'" Warzon, 60 F.3d at 1239 (quoting, Wilbur, 3 F.3d at 217-18).

The test for determining whether a person is a policy maker is whether his position "authorizes, either directly or indirectly, meaningful input into governmental decision making on issues where there is room for principled disagreement on goals or their implementation." Nekolny v. Palmer, 653 F.2d 1164, 1170 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982). This test requires a functional analysis of the powers inherent in the office as opposed to the functions actually performed by the particular officer or employee. Hudson v. Burke, 913 F.2d 427, 431 (7th Cir. 1990); Tomczak v. City of Chicano, 765 F.2d 633, 641 (7th Cir.), cert. denied, 474 U.S. 946 (1985).

Against that backdrop, the position of Special Investigator is exempt from the general ban on patronage dismissal. At the onset, a Special Investigator is appointed by and serves at the pleasure of the State's Attorney. See 55 Ill. Comp. Stat. 5/3-9005(b) (West 1993). His term of office, therefore, is limited to the term of the State's Attorney who appointed him. See Heck v. City of Freenort, 985 F.2d 305, 307-08 (7th Cir. 1993); Wolf v. City of Fitchburg, 870 F.2d 1327, 1331 (7th Cir. 1989). The purpose behind the term limit "is to enable a newly elected executive to assemble a team of officials whom [she] trusts to develop and carry out [her] agenda ...." Heck, 985 F.2d at 307. Thus, "political affiliation would seem not merely a permissible, but actually a desirable criterion for those appointments." Id. at 310; see, also, Kline v. Hughes, 131 F.3d 708, 710 (7th Cir. 1997) (holding that statutory scheme allowing county auditor to appoint or terminate deputy coroner, placed deputy coroner in policymaking position).

In addition to the inherently political nature of the position, the Special Investigator's investigative duties provide for meaningful input into the State's Attorney's

policy making decisions. A State's Attorney's powers and duties are broad and encompass civil, criminal and administrative matters relating to all facets of county government. 55 Ill. Comp. Stat. 5/39005(b) (West 1993). Id. The fact that the State's Attorney is statutorily authorized to assign an investigation on any matter pertaining to the performance of the State's Attorney's broad powers and duties demonstrates that the office of Special Investigator has the potential to influence the State's Attorney's decisions. See Kline, 131 F.3d at 710, fn. 4. See, g.g., Hudson,, 913 F.2d at 432-33 (investigators for city finance committee provided sufficient subjective input into policy decisions); Danahy v. Buscaglia, 134 F.3d 1185, 1192 (2d Cir. 1998) (attorney general investigators received and provided confidential information used to make prosecutorial decisions so that defendant reasonably perceived the positions were policymaking or confidential).

In this vein, the Special Investigator's ability to influence the State's Attorney is analogous to the appointed position of Assistant State's Attorney, for which political loyalty is a constitutionally permissible job requirement. See Livas v. Petka, 711 F.2d 798 (7th Cir. 1983). Like Special Investigators, Assistant State's Attorneys are appointed by the State's Attorney, and their actions must "conform with the broad objectives chosen by the [State's Attorney]." 711 F.2d at 801. The State's Attorney is entitled to demand absolute loyalty under these circumstances. Id..

Even if the Special Investigator is not a policymaker, at the very least, he occupies a position of confidentiality. A confidential position is one which "encompasses those government employees who, while not decision makers, are in close contact with policymakers and the highly confidential communications or records affecting decisions." Meeks v. Grimes, 779 F.2d 417, 420 (7th Cir. 1985). The concern is not only confidentiality in terms of preventing leaks of confidential and sensitive information or keeping

secrets, but also confidentiality in the sense of political loyalty. Id.; Matlock v. Barnes, 932 F.2d 658, 665 (7th Cir.), cert. denied, 502 U.S. 909 (1991). Political animosity can create a hostile work environment with regard to those employees who have direct and constant contact with a political official. Meeks, 779 F.2d at 422-23. "[I]t would strain credulity to read the First Amendment or Elrod to require an elected official to work in constant direct contact with a person viewed as a political enemy." Id. at 423.

The position of Special Investigator necessarily requires direct and confidential contact with the State's Attorney. For example, a State's Attorney may use a Special Investigator to investigate criminal misconduct, even before formal charges are brought. See People v. Nohren, 283 Ill. App. 3d 753, 670 N.E.2d 1208, 1211, 1212 (4th Dist. 1996), appeal denied, 171 I11.2d 578 (1997). She may also use a Special Investigator to assist in a confidential grand jury investigation or to investigate improprieties or corruption in county government. These functions necessarily require a close, confidential relationship between the Special Investigator and the State's Attorney.

In the instant case, the State's Attorney would have been justified in demanding loyalty from her Special Investigators. Plaintiffs allege that they were political enemies of State's Attorney Gorecki. They were appointed by her predecessor whom they allegedly actively supported in the primary election. Plaintiffs also contend that they openly campaigned against Gorecki and publicly accused her of dishonest, unethical and illegal misconduct, and further claimed that she lacked competency, experience and leadership. Given that Plaintiffs occupied confidential positions, it would have been entirely lawful for Gorecki not to reappoint Plaintiffs for political reasons.[1] Accordingly,

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[1] The significance of Plaintiff Carlson's allegation that Gorecki (continued...)

State's Attorney Gorecki did not violate Plaintiffs' First Amendment rights.

C. Defendant Enjoys Qualified Immunity Because It Was Not Clearly Established That Political Loyalty Was Not An Appropriate Requirement For The Position of State's Attorney Special Investigator

In order for the asserted Constitutional right to be clearly established, the plaintiff must point to a closely analogous case establishing that the conduct was unlawful, or show that the violation was so obvious that a reasonable public official would have known that she was violating a constitutional right. See Morrell v. Mock, 270 F.3d 1090, 1100 (7th Cir. 2001). There is no U.S. Supreme Court or Seventh Circuit case which clearly established in December of 2000 that a State's Attorney Special Investigator, who actively opposed the candidacy of, and spoke out critically against the newly elected State's Attorney, could not be fired for political reasons. Furthermore, it was not so obvious from the existing caselaw that Gorecki would have known that refusing to reappoint Plaintiffs as Special Investigators violated their rights

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[1] (...continued)
retaliated against him for accusing her of circulating false election material is unclear. (See Sec. Am. Compl., 11-15). Carlson's accusation occurred in June of 1999 when Gorecki was a private citizen. Furthermore, it is not clear whether the alleged retaliation took place after Gorecki took office. Also, there is no factual connection alleged between the accusation and Gorecki's decision not to reappoint Carlson. In any event, assuming there is a causal connection, Carlson's accusation falls within the scope of free speech which a public official may consider in political termination cases under Warzon. 60 F.3d at 1239 and Wilbur, 3 F.3d at 217-18.

A review of the sparse case law in Illinois involving the position of investigator, as that term is used in different contexts, results in divergent views. Compare Hudson v. Burke, 913 F.2d 427 (7th Cir. 1990) (holding that investigators for city finance committee could be fired for their political affiliation because their positions were inherently political and they provided meaningful input into decisions of finance committee), with Matlock v. Barnes, 932 F.2d 658 (7th Cir. 1991) (holding that legal investigator for city law department could not be fired because position was not politically appointed and was limited to taking witness statements and photographs, and obtaining records relating to accident and small property damage claims), and Nitschneider v. Miller, 821 F. Supp. 1258, 1263 (N.D. Ill. 1993) (commenting that it was difficult to assess on the spectrum of autonomy and discretion whether political termination of a city police investigator violated a clearly established constitutional right).

The closest case on point comes from the Fifth Circuit. In Gunaca v. State of Texas, 65 F.3d 467 (5th Cir. 1995), a newly elected county district attorney refused to reappoint an investigator who had supported the former district attorney. The Court held that the defendant was entitled to qualified immunity, because it was not clearly established based on Supreme Court or Fifth Circuit precedent that firing the investigator violated the First Amendment. 65 F.3d at 475. The Court held that no case "had addressed an issue sufficiently analogous that a reasonable official would understand from its resolution that it was a First Amendment violation to dismiss or to not hire an investigator on the grounds that the investigator supported the campaign of the official's opponent." Id. The Court concluded that "[b]ecause reasonable public officials could have differed on the lawfulness of [the district attorney's] actions at the time they occurred, [he] was entitled to qualified immunity." Id.

The Second Circuit has also addressed the position of investigator serving an employer with a prosecutorial function. In Danahy v. Buscaglia, 134 F.3d 1185 (2d Cir.1998), investigators with the state attorney general's office were fired for their political affiliation with the prior attorney general. They were part of a statewide highly specialized prosecutor's office

and were hired by and served at the pleasure of the attorney general. They worked closely with the prosecutors and dealt with highly confidential matters. After measuring these facts against existing federal cases, the court held that the defendants could have reasonably perceived that the plaintiff investigators were policymaking or confidential employees. 134 F.3d at 1193. Therefore, the defendants were entitled to qualified immunity. Id.

In contrast, the Tenth Circuit in Laidley v. McClain, 914 F.2d 1386, 1395 (10th Cir. 1990), held that a newly elected district attorney was not entitled to qualified immunity for firing an investigator who had supported his opponent in the election. The plaintiff was an investigator in the child support division of the district attorney's office. Her duties included locating absent parents, serving process, sending letters, conducting interviews, contacting clients, and answering the telephone. Describing the investigator as "a low-level staff employee," the court held that the plaintiffs right to her job under Elrod and Branti was clearly established. Id.

In light of the divergent case law, a reasonable official in Defendant Gorecki's position would not be expected to know and understand that it was unlawful to fire a Special Investigator who had been appointed by her predecessor and had actively campaigned and spoke out critically against her. Thus, Gorecki is entitled to qualified immunity.

D. THIS COURT SHOULD DECLINE TO EXERCISE JURISDICTION OVER THE STATE LAW DEFAMATION CLAIM

Absent unique circumstances, district courts normally relinquish jurisdiction over pendent state claims when all federal claims have been dismissed before trial. Groce v. Eli Lilly & Co., 193 F.3d 496, 501 (7th Cir. 2000); Wright v. Associated Ins. Cos., Inc., 29 F.3d 1244, 1251 (7th Cir. 1994). Should this Court grant summary judgment on Count I, jurisdiction over Count II would be based entirely upon the supplemental jurisdiction statute, 28 U.S.C. § 1367. Section 1367(c)(3) allows this Court to decline supplemental jurisdiction after dismissal of all federal claims. Since there is no compelling reason for this Court to retain jurisdiction, the Defendant asks that this Court relinquish jurisdiction over Plaintiffs' state law claim.

CONCLUSION

Based on the foregoing, the Defendant, Mary E. Gorecki, respectfully requests that this Honorable Court enter summary judgment in her favor.

/s/ MICHAEL D. BERSANI,
One of the Attorneys for the Defendant

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Phillip D. Carlson and Thomas Smith *Plaintiffs,*	)	No. 01 C 9235
v.	)	**Charles R. Norgle, Sr.,** Judge Presiding.
Mary E. Gorecki, *Defendant.*	)	

LOCAL RULE 56.1 STATEMENT OF UNCONTESTED MATERIAL FACTS IN SUPPORT OF DEFENDANT MARY E. GORECKI"S MOTION FOR SUMMARY JUDGMENT

1. Defendant is the duly elected State's Attorney of Kane County Illinois (Answ. to Second Am. Compl., ¶ 4, attached hereto as Exhibit A).

2. Defendant won the Republican nomination for Kane County State's Attorney on March 21, 2000 against the incumbent State's Attorney David Akemann (Ex. A, ¶ 20).

3. Defendant defeated a Democratic opponent, Robert J. Steffen, in the general election on November 7, 2000 (Ex. A, ¶ 32).

4. Defendant took office on December 1, 2000 (Ex. A, ¶ 33).

5. Plaintiff Carlson was appointed Special Investigator by former Kane County State's Attorney David Akemann in

1996 (Ex. A, ¶ 5; Carlson Certif. of Appt., attached as Exhibit B).

6. Plaintiff Smith was appointed Special Investigator by Akemann in September 1999 (Ex. A, ¶ 6; Smith Certif, of Appt., attached as Exhibit C).

7. A State's Attorney is statutorily authorized to appoint one or more Special Investigators to serve subpoenas, make return of process and conduct investigations which assist the State's Attorney in the performance of her duties. (55 Ill. Comp. Stat. 5/3-9005(b) (West 1993), attached as Exhibit D; Plaintiffs' Job Descriptions, attached as Exhibit E).

8. Subject to certain qualifications, Special Investigators are peace officers and have all the powers possessed by investigators under the State's Attorneys Appellate Prosecutor's Act (Ex. D, § 5/3-9005(b)).

9. Under the State's Attorneys Appellate Prosecutor's Act, investigators provide investigative services in criminal cases and tax objection cases for staff counsel and county state's attorneys. (725 111. Comp. Stat. 210/7.06 (West 1993), attached hereto as Exhibit F).

10. Upon taking office on December 1, 2000, Defendant eliminated the positions of Special Investigators and did not reappoint Plaintiffs as Special Investigators (Ex. A, 36).

/s/ MICHAEL D. BERSANI,
One of the attorneys for the Defendant

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IN THE UNITED STATES DISTRICT COURT
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Mary E. Gorecki, Defendant-Appellant.	)	

ANSWER TO SECOND AMENDED COMPLAINT

NOW COMES the Defendant, MARY E. GORECKI, by and through her attorneys, JAMES G. SOTOS and MICHAEL D. BERSANI of HERVAS, SOTOS, CONDON & BERSANI, P.C., and for her answer to Plaintiffs' Second Amended Complaint, states as follows:

1. That this action is brought pursuant to 29 U.S.C. § 623, the Civil Rights Act of 1871, 42 U.S.C. § 1983, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, the Constitution of the United States of America, and the State of Illinois Constitution. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1331 and 1343 and its jurisdiction over pendent state law claims.

ANSWER:The Defendant admits the allegations contained in paragraph one of the Second Amended Complaint.

PARTIES

2. That Plaintiff, PHILLIP D. CARLSON, (hereinafter sometimes referred to as "Plaintiff Carlson"), is a resident of the State of Illinois and a citizen of the United States of America.

ANSWER: The Defendant admits the allegations contained in paragraph two of the Second Amended Complaint.

3. That Plaintiff, THOMAS R. SMITH (hereinafter sometimes referred to as "Plaintiff Smith"), is a resident of the State of Illinois and a citizen of the United States of America.

ANSWER: The Defendant states that she has knowledge or information insufficient to form a belief as to the truth or falsity of the allegation that Plaintiff Smith is a resident of the State of Illinois. The Defendant admits that Plaintiff is a citizen of the United States of America.

4. That Defendant MARY E. GORECKI was at all times hereinafter mentioned acting under state law as the State's Attorney of the County of Kane.

ANSWER: The Defendant admits that she was acting under color of state law as the State's Attorney of the County of Kane on or after December 1, 2000 when she took office as Kane County State's Attorney. The Defendant denies acting under color of state law for acts alleged to have occurred prior to Defendant taking office on December 1, 2000.

FACTS

5. That Plaintiff Carlson was hired to be an investigator for the Kane County State's Attorney's Office in April 1996.

ANSWER: The Defendant admits that Plaintiff Carlson was appointed Special Investigator by the Kane County State's Attorney in April 1996.

6. That Plaintiff Smith was hired to be an investigator for the Kane County State's Attorney's Office in August 1999.

ANSWER: The Defendant admits that Plaintiff Smith was appointed Special Investigator by the Kane County State's Attorney in September 1999.

7. That prior to his hiring, Plaintiff Smith had over (30) years experience in investigative and law enforcement work for the Cook County Sheriff's Police's.

ANSWER: The Defendant states that she has knowledge or information insufficient to form a belief as to the truth or falsity of the allegations contained in paragraph seven of the Second Amended Complaint.

8. That prior to his hiring, Plaintiff Carlson had over twelve (12) years experience in investigative work for the Illinois Secretary of State's Office.

ANSWER: The Defendant states that she has knowledge or information insufficient to form a belief as to the truth or falsity of the allegations contained in paragraph eight of the Second Amended Complaint.

9. That prior to Defendant Mary E. Gorecki's assumption of the Kane County State's Attorney's Office, Plaintiffs had always enjoyed the highest professional reputations as investigators and law enforcement officers for the State's Attorney's Office.

ANSWER: The Defendant denies the allegations contained

in paragraph nine of the Second Amended Complaint.

10. That during the primary campaign for the Office of Kane County State's Attorney, evidence came to light of potential wrongdoing by Defendant Mary E. Gorecki as a candidate for the position of State's Attorney.

ANSWER: The Defendant denies the allegations contained in paragraph ten of the Second Amended Complaint.

11. That in or about June 1999 Plaintiff Carlson discovered that Defendant Mary E. Gorecki had been circulating false and politically damaging election materials concerning the Honorable James T. Doyle, a sitting judge and candidate for retention to the Sixteenth Judicial District.

ANSWER: The Defendant denies the allegations contained in paragraph eleven of the Second Amended Complaint, and specifically denies circulating false and politically damaging election materials concerning Judge Doyle.

12. That speaking out on a matter of public concern that Kane County be served by an honest and competent judiciary, Plaintiff Carlson advised Judge Doyle that the source of the false and politically damaging election materials was Defendant Mary E. Gorecki.

ANSWER: The Defendant states that she has knowledge or information insufficient to form a belief as to the truth or falsity of the allegations contained in paragraph twelve of the Second Amended Complaint, except that Defendant denies that she was the source of false and politically damaging election material concerning Judge Doyle.

13. That shortly thereafter, Judge Doyle confronted Defendant Mary E. Gorecki about the false and politically damaging election materials, and she admitted that she was involved in the distribution of the materials.

ANSWER: The Defendant denies the allegations contained in paragraph thirteen of the Second Amended Complaint.

14. That during the confrontation, Defendant Mary E. Gorecki was advised that Judge Doyle had learned of her involvement from Plaintiff Carlson.

ANSWER: The Defendant denies the allegations contained in paragraph fourteen of the Second Amended Complaint.

15. That thereafter, in retaliation for having exposed her involvement, Defendant Mary E. Gorecki started a systematic attack on the integrity and honesty of Plaintiff Carlson.

ANSWER: The Defendant denies the allegations contained in paragraph fifteen of the Second Amended Complaint.

16. That prior to and after becoming Kane County State's Attorney Defendant Mary E. Gorecki falsely accused Plaintiff Carlson of threatening her mother's job and made public and false statements that Plaintiff Carlson was unskilled, unqualified and uncertified as a peace officer.

ANSWER: The Defendant denies the allegations contained in paragraph sixteen of the Second Amended Complaint.

17. That in February 2000 Defendant Mary E. Gorecki left a series of tape recorded messages to Deputy Sheriff Jane Morrison offering to get a job for Ms. Morrison's husband in the Kane County Highway Department in exchange for campaign contributions to certain Kane County officials and a additional ten to fifteen (10% to 15%) of the first year's salary realized for such a job.

ANSWER: The Defendant admits that she left one or more tape recorded messages to Deputy Jane Morrison. The Defendant denies the remaining allegations contained in paragraph seventeen of the Second Amended Complaint.

18. That on March 2, 2000 the tape recordings and allegations that Gorecki talked to Morrison about a kickback surfaced just weeks before the Republican primary in which Defendant Mary E. Gorecki was challenging incumbent David Akemann for the office of State's Attorney of Kane County.

ANSWER: The Defendant admits the allegations contained in paragraph eighteen of the Second Amended Complaint.

19. That Defendant Mary E. Gorecki initially denied that it was her voice on the tape recordings.

ANSWER: The Defendant denies the allegations contained in paragraph nineteen of the Second Amended Complaint.

20. That on March 21, 2000 Defendant Mary E. Gorecki won the primary election for the Republican nomination for the office of Kane County State's Attorney.

ANSWER: The Defendant admits the allegations contained in paragraph twenty of the Second Amended Complaint.

21.That prior to Defendant Mary E. Gorecki becoming Kane County State's Attorney, she falsely identified Plaintiff Carlson of being the individual involved in a kickback scheme for jobs in Kane County.

ANSWER: The Defendant denies the allegations contained in paragraph twenty-one of the Second Amended Complaint, and specifically denies identifying any individual in a kickback scheme for jobs in Kane County.

22. That on or about September 1, 2000 Defendant Mary E. Gorecki publicly admitted to leaving the taped messages.

ANSWER: The Defendant admits that on or about September 1, 2000 she publicly admitted to leaving one or more taped messages.

23. That Defendant Mary E. Gorecki later publicly admitted that she had talked to Morrison about a county job, claimed it was a joke, and denied talk of a kick back.

ANSWER: The Defendant admits the allegations contained in paragraph twenty-three of the Second Amended Complaint.

24. That State's Attorney Akemann requested that a Special Prosecutor be appointed to investigate the allegations of wrongdoing by Defendant Mary E. Gorecki.

ANSWER: The Defendant admits that it was her understanding that State's Attorney Akemann requested that a Special Prosecutor be appointed to investigate the allegations of wrongdoing by Defendant Mary E. Gorecki.

25. That on or about September 8, 2000 Kane County Chief Judge Grant Wegner appointed Daniel D. Doyle, a former judge from Rockford to investigate the allegations of wrongdoing by Defendant Mary E. Gorecki.

ANSWER: The Defendant admits that it was her understanding that on or about September 8, 2000 Kane County Chief Judge Grant Wegner appointed Daniel D. Doyle, a former judge from Rockford to investigate the allegations of wrongdoing by Defendant Mary E. Gorecki.

26. That the investigation by the Special Prosecutor found cause for and did forward the results of his investigation to the Attorney Registration and Disciplinary Commission.

ANSWER: The Defendant denies that the investigation by the Special Prosecutor found cause. The Defendant states that she has knowledge or information insufficient to form a belief as to the truth or falsity of the remaining allegations contained in paragraph twenty-six of the Second Amended Complaint.

27. That Defendant Mary E. Gorecki falsely and publicly stated that she had been exonerated of any wrongdoing through investigations conducted by the Federal Bureau of Investigation, the Illinois Attorney General's Office, and Appellate Court Prosecutor's Office, and Special Prosecutor Daniel D. Doyle.

ANSWER: The Defendant denies the allegations contained in paragraph twenty-seven of the Second Amended Complaint.

28. That these false and public statements were reported widely throughout Kane County print and electronic media.

ANSWER: The Defendant denies the allegations contained in paragraph twenty-eight of the Second Amended Complaint.

29. That, as a matter of fact, the Attorney Registration and Disciplinary Commission filed a formal complaint against Defendant Mary E. Gorecki alleging that she had violated professional rules of conduct when she left the tape recorded messages.

ANSWER: The Defendant admits the allegations contained in paragraph twenty-nine of the Second Amended Complaint.

30. That in or about October 2000, Plaintiff Smith, a duly elected Township Precinct Committeeman of the Republican Party, in an exercise of free speech on a matter of public concern that Kane County be served by an honest and competent chief law enforcement officer, authored and circulated a letter to his constituency indicating his concern for the credibility and fitness of Defendant Mary E. Gorecki to hold the office of Kane County State's Attorney.

ANSWER: The Defendant states that she has knowledge or information insufficient to form a belief as to the truth or falsity of the allegations contained in paragraph thirty of the Second Amended Complaint.

31. That during the election campaign, Plaintiffs Carlson and Smith, in an exercise of free speech on a matter of public concern, openly expressed their support for the candidate opposed to Defendant Mary E. Gorecki in the State's Attorney's race.

ANSWER: The Defendant states that she has knowledge or information insufficient to form a belief as to the truth or falsity of the allegations contained in paragraph thirty-one of the Second Amended Complaint.

32. That on November 7, 2000 Defendant Mary E. Gorecki defeated Robert Steffen in the Kane County State's Attorney's race.

ANSWER: The Defendant admits the allegations contained in paragraph thirty-two of the Second Amended Complaint.

33. That on December 1, 2000, on her first day in office, Defendant Mary E. Gorecki called a meeting with Plaintiffs.

ANSWER: The Defendant admits the allegations contained in paragraph thirty-three of the Second Amended Complaint.

34. That during that meeting, Plaintiff Thomas R. Smith presented Defendant Mary E. Gorecki with a copy of the letter that he had authored and circulated to his constituency.

ANSWER: The Defendant admits that at the conclusion of the meeting Plaintiff Thomas R. Smith presented Defendant with a copy of a letter. The Defendant states that she has knowledge or information insufficient to form a belief as to the truth or falsity of the remaining allegations contained in paragraph thirty-four of the Second Amended Complaint.

35. Plaintiff Smith advised Defendant Mary E. Gorecki that he did not want her to learn of the document from any other source but him and pledged to her that he would continue to serve the State's Attorney's Office and the citizens of Kane County with honesty, integrity, and professionalism as a member of the State's Attorney's investigator staff.

ANSWER: The Defendant admits the allegations contained in paragraph thirty-five of the Second Amended Complaint.

36. That at that meeting in which other members of her campaign staff were in attendance, Defendant Mary E. Gorecki summarily dismissed and discharged Plaintiffs from their positions as investigators for the Kane County State's Attorney's Office.

ANSWER: The Defendant denies the allegations contained in paragraph thirty-six of the Second Amended Complaint. The Defendant states affirmatively that she eliminated the positions of Special Investigators and did not reappoint Plaintiffs as Special Investigators.

37. That said dismissals and discharge were in retaliation for Plaintiffs having spoken out on matters of public concern

regarding the integrity and competency of Defendant Mary E. Gorecki to serve as Kane County State's Attorney and the perception by Defendant Mary E. Gorecki that Plaintiffs "whistleblew" to law enforcement agencies and the Attorney Registration and Disciplinary Commission about her alleged wrongdoing.

ANSWER: The Defendant denies the allegations contained in paragraph thirty-seven of the Second Amended Complaint.

38. That Defendant Mary E. Gorecki, in an attempt to embarrass Plaintiffs, had them unceremoniously escorted from the building.

ANSWER: The Defendant denies the allegations contained in paragraph thirty-eight of the Second Amended Complaint.

39. That following their open expressions of speech on matters of public concern to the Kane County community as aforesaid, Plaintiffs were terminated as investigators with the Kane County State's Attorney's Office on December 1, 2000.

ANSWER: The Defendant denies the allegations contained in paragraph thirty-nine of the Second Amended Complaint.

COUNT I

1-39. Plaintiffs re-allege Paragraphs 1 through 39 of this Second Amended Complaint as Paragraphs I through 39 of Count I as though fully set forth herein.

ANSWER: The Plaintiffs reallege and incorporate by reference paragraphs 1 through 39 of the Second Amended

Complaint as paragraphs 1 through 39 of this Count I. Therefore, the Defendant realleges and incorporates her answers to paragraphs i through 39 of the Second Amended Complaint as her answers to paragraphs I through 39 of this Count I.

40. That Kane County has a custom and policy of using governmental power as an instrument of oppression to suppress employees from expressing their beliefs and/or opinions on matters of public concern.

ANSWER: The Defendant makes no response to paragraph forty as said allegations are directed at Kane County, and the County is not a Defendant in this lawsuit.

41. That prior to and immediately after assuming the Office of Kane County State's Attorney, and in an attempt to retaliate against Plaintiffs for their exercise of free speech on a matter of public concern, Defendant Mary E. Gorecki made public statements that Plaintiffs were dismissed because they were unqualified.

ANSWER: The Defendant denies the allegations contained in Count I, paragraph forty-one of the Second Amended Complaint.

42. That prior to and after becoming Kane County State's Attorney, Defendant Mary E. Gorecki further falsely stated that Plaintiffs had not completed the Police Training Institute Program, a 400 hour training regimen required of sworn police officers, a statement that she knew to be false or about which she had a reckless disregard for the truth.

ANSWER: The Defendant denies the allegations contained in Count I, paragraph forty-two of the Second Amended Complaint.

43. That prior to and after becoming Kane County State's Attorney, Defendant Mary E. Gorecki harassed Plaintiff Carlson and besmirch his good name and reputation by falsely accusing him of theft of Kane County property and equipment.

ANSWER: The Defendant denies the allegations contained in Count I, paragraph forty-three of the Second Amended Complaint.

44. That because of the false statements made by Defendant Mary E. Gorecki in retaliation of their exercise of free speech on a matter of public concern, Plaintiffs suffered irreparable harm to their personal and professional reputations.

ANSWER: The Defendant denies the allegations contained in Count I, paragraph forty-four of the Second Amended Complaint.

45. That although the job performance of and by Plaintiffs sufficiently met the legitimate expectations of Kane County, their employment was terminated without cause, justification or prior warning by Gorecki when she became Kane County State's Attorney.

ANSWER: The Defendant denies the allegations contained in Count I, paragraph forty-five of the Second Amended Complaint.

46. That Plaintiffs spoke out on matters of public concern, to wit:

a) the need for honesty and integrity of candidates for public office in Kane County; and,

b) the honesty and integrity of Defendant Mary E. Gorecki to serve as the chief law enforcement officer of Kane County.

ANSWER: That Defendant states that she has knowledge or information insufficient to form a belief as to the truth or falsity of the allegations contained in Count I, paragraph forty-six of the Second Amended Complaint.

47. That Plaintiffs strongly opposed, in public meetings and/or written communications to their constituency, the candidacy of Defendant Mary E. Gorecki because of her public statements of denial and later admission of involvement in a kick back scheme.

ANSWER: The Defendant denies involvement in a kick back scheme. Defendant states that she has knowledge or information insufficient to form a belief as to the truth or falsity of the remaining allegations contained in Count I, paragraph forty-seven of the Second Amended Complaint.

48. That Plaintiffs criticized Defendant Mary E. Gorecki for reportedly using her "influence" to guarantee employment with a public entity in exchange for financial kickback.

ANSWER: The Defendant denies using her influence to guarantee employment with a public entity in exchange for financial kickback. Defendant states that she has knowledge or information insufficient to form a belief as to the truth or falsity of the remaining allegations contained in paragraph forty-eight of the Second Amended Complaint.

49. That Defendant Mary E. Gorecki made public statements critical of Plaintiffs and contended that they were not fit and properly credentialed to be investigators for the Kane County State's Attorney's Office.

ANSWER: The Defendant denies the allegations contained in Count I, paragraph forty-nine of the Second Amended Complaint.

50. That Plaintiffs' interest in acting as responsible citizens, and in speaking out on the actions described above support their claims to constitutional protection of their First Amendment freedom of speech.

ANSWER: The Defendant denies the allegations contained in Count I, paragraph fifty of the Second Amended Complaint.

51. That Plaintiffs were engaged in conduct protected by the First Amendment.

ANSWER: That Defendant states that she has knowledge or information insufficient to form a belief as to the truth or falsity of the allegations contained in Count I, paragraph fifty-one of the Second Amended Complaint.

52. That as a result of the previously mentioned acts, Defendant Mary E. Gorecki, acting under color of state law as the agent of County of Kane, has deprived and continues to deprive Plaintiffs of their rights under the First Amendment of the United States Constitution and the Illinois Constitution in violation of 42 U.S.C. § 1983.

ANSWER: The Defendant denies the allegations contained in Count I, paragraph fifty-two of the Second Amended Complaint.

53. That the acts of Defendant Mary E. Gorecki were and are the proximate cause of injury and damage to Plaintiffs.

ANSWER: The Defendant denies the allegations contained in Count I, paragraph fifty-three of the Second Amended Complaint.

54. That the action taken by Defendant Mary E. Gorecki to terminate Plaintiffs for their right of free expression irreparably harmed Plaintiffs.

ANSWER: The Defendant denies the allegations contained in Count I, paragraph fifty-four of the Second Amended Complaint.

55. That Defendant Mary E. Gorecki has acted and continues to act with malice, willfulness, and callous and reckless indifference to the rights of Plaintiffs.

ANSWER: The Defendant denies the allegations contained in Count I, paragraph fifty-five of the Second Amended Complaint.

ANSWER: The Defendant states that she has knowledge or information insufficient to form a belief as to the truth or falsity of the allegations contained in Count I, paragraph sixty-one of the Second Amended Complaint.

62. That Plaintiffs position required little or no contact with the State's Attorney and job assignments were initiated by the several Assistant State's Attorney in the office who also oversaw the day to day activities of the investigators.

ANSWER: The Defendant denies the allegations contained in Count I, paragraph sixty-two of the Second Amended Complaint.

63. That Defendant Mary E. Gorecki did, in fact, deprive Plaintiffs of their rights by terminating their employment in

retaliation for Plaintiffs' speech on matters of public concern.

ANSWER: The Defendant denies the allegations contained in Count I, paragraph sixty-three of the Second Amended Complaint.

64. That actions of Defendant Mary E. Gorecki in terminating Plaintiffs are likely to chill the exercise of constitutionally protected speech of others in a comparable position.

ANSWER: The Defendant denies the allegations contained in Count I, paragraph sixty-four of the Second Amended Complaint.

65. That Plaintiffs' employment was terminated without cause or justification or prior warning.

ANSWER: The Defendant denies the allegations contained in Count 1, paragraph sixty-five of the Second Amended Complaint.

66. That Defendant Mary E. Gorecki was aware of Plaintiffs' activities in furtherance of public policy.

ANSWER: The Defendant states that she has knowledge or information insufficient to form a belief as to the truth or falsity of the allegations contained in Count I, paragraph sixty-six of the Second Amended Complaint.

67.That no reasonable cause or justification existed to discharge Plaintiffs from their employment.

ANSWER: The Defendant denies the allegations contained in Count I, paragraph sixty-seven of the Second Amended Complaint.

68. That by wrongfully discharging Plaintiffs without cause or justification, and for retaliatory reasons set forth above, Defendant Mary E. Gorecki acted willfully and with malice toward Plaintiffs.

ANSWER: The Defendant denies the allegations contained in Count I, paragraph sixty-eight of the Second Amended Complaint.

69. That as a direct and proximate result of the wrongful and unlawful termination, Plaintiffs have suffered the loss of their employment, the loss of their salary and benefits, and damage to their reputation and future earning potential.

ANSWER: The Defendant denies the allegations contained in Count I, paragraph sixty-nine of the Second Amended Complaint.

WHEREFORE, the Defendant denies that the Plaintiffs are entitled to any judgment whatsoever against her, and prays this Honorable Court will enter judgment in her favor and allow for the costs of defending this lawsuit.

COUNT II

1-69. Plaintiffs re-allege Paragraphs 1 through 69 of this Second Amended Complaint as Paragraphs 1 through 69 of Count II as though fully set forth herein.

ANSWER: The Plaintiffs reallege and incorporate by reference paragraphs 1 through 69 of the Second Amended Complaint as paragraphs I through 69 of this Count II. Therefore, the Defendant realleges and incorporates her answers to paragraphs 1 through 69 of the Second Amended Complaint as her answers to paragraphs I through 69 of this Count II.

70. That at the time of the commission by Defendant Mary E. Gorecki of the grievances hereinabove mentioned, and for a long time prior thereto, Plaintiffs were employed as investigators in the Kane County State's Attorneys Office.

ANSWER: The Defendant admits that Plaintiffs were employed as Special Investigators by the Kane County State's Attorney. The Defendant denies the remaining allegations contained in Count 11, paragraph seventy of the Second Amended Complaint.

71. That it was the job responsibility of Plaintiffs to investigate and report violations of the criminal law where ever they discovered them.

ANSWER: The Defendant admits that it was the job responsibility of a Special Investigator to investigate and report violations of criminal law, as directed by the Kane County State's Attorney.

72. That Plaintiffs have always conducted themselves in said employment with efficiency, honesty and punctuality.

ANSWER: The Defendant denies the allegations contained in Count I, paragraph seventy-two of the Second Amended Complaint.

73. That Plaintiffs were always deservedly held in high esteem by members of the Kane County State's Attorney's Office, by the citizens of Kane County, and by all those persons with whom they had dealings as investigators for the State's Attorneys Office.

ANSWER: The Defendant denies the allegations contained in Count II, paragraph seventythree of the Second Amended

Complaint.

74. That the Plaintiffs held their positions with the Kane County State's Attorneys Office for the maintenance and support of themselves and their families.

ANSWER: The Defendant states that she has knowledge or information insufficient to form a belief as to the truth or falsity of the allegations contained in Count II, paragraph seventy-four of the Second Amended Complaint.

75. That on or about December 5, 2000, at Geneva, Kane County, Illinois well knowing the premises but maliciously and wickedly contriving and intending to injure and destroy Plaintiffs' good names, credit and reputations in their employment and bring them into disgrace among the members of the State's Attorney's Office, the members of the law enforcement community, and the citizens of Kane County with whom Plaintiffs had dealings, and to cause Plaintiffs to be regarded as persons unfit and unworthy to perform the duties of their employment, to prejudice and injure Plaintiffs in their employment, and to cause them the loss of their employment, Defendant Mary E. Gorecki falsely, maliciously and wrongfully made false, defamatory, and slanderous statements about them and their abilities and credentials to act as investigators for the Kane County State's attorney's Office.

ANSWER: The Defendant denies the allegations contained in Count II, paragraph seventy five of the Second Amended Complaint.

76. That prior to and after Defendant Mary E. Gorecki became Kane County State's Attorney, she stated publicly and to the press that Plaintiffs were unqualified and unfit to perform their jobs.

ANSWER: The Defendant denies the allegations contained in Count II, paragraph seventy-six of the Second Amended Complaint.

77. That prior to and after Defendant Mary E. Gorecki became Kane County State's Attorney, she stated publicly and to the press that Plaintiff Carlson had committed a crime by participating in an illegal "kick-back" scheme in order to secure jobs for various persons.

ANSWER: The Defendant denies the allegations contained in Count II, paragraph seventyseven of the Second Amended Complaint.

78. That prior to and after Defendant Mary E. Gorecki became Kane County State's Attorney, stated publicly and to the press that Plaintiff Smith obtained his job only through nefarious and corrupt political deals.

ANSWER: The Defendant denies the allegations contained in Count II, paragraph seventyeight of the Second Amended Complaint.

79. That Defendant Mary E. Gorecki stated publicly and to the press, "I have terminated two investigators from the employ of the Kane County State's Attorneys Office. Investigators Phil Carlson and T.R. Smith did not complete the Police Training Institute Program, a 400 hour training regimen."

ANSWER: The Defendant denies the allegations contained in Count II, paragraph seventynine of the Second Amended Complaint.

80. That Defendant Mary E. Gorecki stated publicly and to the press that Plaintiff Carlson had committed a crime by

stealing government property and stealing tires from Sam's Club.

ANSWER: The Defendant denies the allegations contained in Count II, paragraph eighty of the Second Amended Complaint.

81. That Defendant Mary E. Gorecki's defamatory remarks made after she became State's Attorney were not in any way justified or within the realm of any legitimate duty and were only uttered to retaliate against Plaintiffs and to mislead and misdirect authorities away from her own culpability.

ANSWER: The Defendant denies that she made any defamatory remarks and further denies the remaining allegations contained in Count II, paragraph eighty-one of the Second Amended Complaint.

82. That said false, defamatory, and slanderous statements were reported widely in the local press and were read by citizens of the Kane County community, by reason of which Plaintiffs were and are greatly injured in their good names, credit, and reputations and have suffered the loss of their employment.

ANSWER: The Defendant denies the allegations contained in Count II, paragraph eighty-two of the Second Amended Complaint.

WHEREFORE, the Defendant denies that the Plaintiffs are entitled to any judgment whatsoever against her, and prays this Honorable Court will enter judgment in her favor and allow for the costs of defending this lawsuit.

_____

/s/ MICHAEL D. BERSANI,
One of the attorneys for the Defendant

FIRST AFFIRMATIVE DEFENSE

NOW COMES the Defendant, MARY E. GORECKI, by and through her attorneys, JAMES G. SOTOS and MICHAEL D. BERSANI of HERVAS, SOTOS, CONDON & BERSANI, P.C., and for her First Affirmative Defense to Plaintiffs' complaint, Defendant states as follows:

The Defendant did not violate any clearly established constitutional right of which a reasonable person would have known, thus entitling her to qualified immunity.

WHEREFORE, the Defendant denies that the Plaintiffs are entitled to any judgment whatsoever against her and prays this Honorable Court will enter judgment in her favor and allow for the costs of defending this lawsuit.

/s/ MICHAEL D. BERSANI,
One of the attorneys for the Defendant

SECOND AFFIRMATIVE DEFENSE

NOW COMES the Defendant, MARY E. GORECKI, by and through her attorneys, JAMES G. SOTOS and MICHAEL D. BERSANI of HERVAS, SOTOS, CONDON & BERSANI, P.C., and for her Second Affirmative Defense to Plaintiffs' complaint, Defendant states as follows:

As an executive official the Defendant is protected from defamation actions by an absolute privilege when making public statements legitimately related to her official duties.

WHEREFORE, the Defendant denies that the Plaintiffs are entitled to any judgment whatsoever against her and prays this Honorable Court will enter judgment in her favor and allow for the costs of defending this lawsuit.

/s/ MICHAEL D. BERSANI,
One of the attorneys for the Defendant

JAMES G. SOTOS
MICHAEL D. BERSANI
HERVAS, SOTOS, CONDON & BERSANI, P.C. 333 Pierce Road, Suite 195 P.O. Box 4109
Itasca, IL 60143-4109
(630) 773-4774

CERTIFICATE OF APPOINTMENT

Phillip D. Carlson

(name)

725 Oak Street, Geneva, IL 60134

(address)

to the position of Special Investigator

effective April 24, 1996

Date 4/24/96

/s/

Title : Kane County States Attorney

STATE OF ILLINOIS
KANE COUNTY

OFFICIAL OATH

I, Phillip D. Carlson, do solemnly swear or affirm that I will support the Constitution of the United States and the Constitution of the State of Illinois, and that I will faithfully discharge the duties of the office of Special Investigator

---

/s/

Date 4/24/96

CERTIFICATE OF APPOINTMENT

1, David R. Akemann, do hereby appoint

T,R. Smith
(name)

8N389 Barron, Maple Park- IL 60151
(address)

to the position of Special Investigator

effective September 1, 1999

_____

/s/

Title Kane County States Attorney

STATE OF ILLINOIS KANE COUNTY

OFFICIAL OATH

I, T.R. Smith, do solemnly swear or affirm that I will support the Constitution of the United States and the Constitution of the State of Illinois, and that I will faithfully discharge the duties of the Office of Special Investigator

Date 9/1/99

Signature _____

Signed` d sworn before me:

"OFRCIAI SEAL"

DAWN G. BARSAN1I

This document has been updated. Use KEYCITE.

Formerly cited as IL ST CH 34 13-9005

WEST'S SMITH-HURD ILLINOIS COMPILED STATUTES ANNOTATED

CHAPTER 55. COUNTIES

ACT 5. COUNTIES CODE

ARTICLE 3. OFFICERS AND EMPLOYEES

DIVISION 3-9. STATE'S ATTORNEY

Copr. © West Group 2002. All rights reserved. Current through P.A. 92-300, apv. 8/9/2001 5/3-9005. Powers and duties of State's attorney

§ 3-9005. Powers and duties of State's attorney.

(a) The duty of each State's attorney shall be:

(1) To commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for his county, in which the people of the State or county may be concerned.

(2) To prosecute all forfeited bonds and recognizances, and all actions and proceedings for the recovery of debts, revenues, moneys, fines, penalties and forfeitures accruing to the State or his county, or to any school district or road district in his county; also, to prosecute all suits in his county against railroad or transportation companies, which may be prosecuted in the name of the People of the State of Illinois.

(3) To commence and prosecute all actions and proceedings brought by any county officer in his official capacity.

(4) To defend all actions and proceedings brought against his county, or against any county or State officer, in his official capacity, within his county.

(5) To attend the examination of all persons brought before any judge on habeas corpus, when the prosecution is in his county.

(6) To attend before judges and prosecute charges of felony or misdemeanor, for which the offender is required to be recognized to appear before the circuit court, when in his power so to do.

(7) To give his opinion, without fee or reward, to any county officer in his county, upon any question or law relating to any criminal or other matter, in which the people or the county may be concerned.

(8) To assist the attorney general whenever it may be necessary, and in cases of appeal from his county to the Supreme Court, to which it is the duty of the attorney general to attend, he shall furnish the attorney general at least 10 days before such is due to be filed, a manuscript of a proposed statement, brief and argument to be printed and filed on behalf of the people, prepared in accordance with the rules of the Supreme Court. However, if such brief, argument or other document is due to be filed by law or order of court within this 10 day period, then the State's attorney shall furnish such as soon as may be reasonable.

(9) To pay all moneys received by him in trust, without delay, to the officer who by law is entitled to the custody thereof.

(10) To notify, by first class mail, complaining witnesses of the ultimate disposition of the cases arising from an indictment or an information.

(11) To perform such other and further duties as may, from time to time, be enjoined on him by law.

(12) To appear in all proceedings by collectors of taxes against delinquent taxpayers for judgments to sell real estate, and see that all the necessary preliminary steps have been legally taken to make the judgment legal and binding.

(b) The State's Attorney of each county shall have authority to appoint one or more special investigators to serve subpoenas, make return of process and conduct investigations which assist the State's Attorney in the performance of his duties. A special investigator shall not carry firearms except with permission of the State's Attorney and only while carrying appropriate identification indicating his employment and in the performance of his assigned duties.

Subject to the qualifications set forth in this subsection, special investigators shall be peace officers and shall have all the powers possessed by investigators under the State's Attorneys Appellate Prosecutor's Act. [FN I]

No special investigator employed by the State's Attorney shall have peace officer status or exercise police powers unless he or she successfully completes the basic police training course mandated and approved by the Illinois Law Enforcement Training Standards Board or such board waives the training requirement by reason of the special investigator's prior law enforcement experience or training or both. Any State's Attorney appointing a special investigator shall consult with all affected local police agencies, to the extent consistent with the public interest, if the special investigator is assigned to areas within that agency's jurisdiction.

Before a person is appointed as a special investigator, his fingerprints shall be taken and transmitted to the Department of State Police. The Department shall examine its records and submit to the State's Attorney of the county in which the investigator seeks appointment any conviction information concerning the person on file with the Department. No person shall be appointed as a special investigator if he has been convicted of a felony or other offense involving moral turpitude. A special investigator shall be paid a salary and be reimbursed for actual expenses incurred in performing his assigned duties. The county

board shall approve the salary and actual expenses and appropriate the salary and expenses in the manner prescribed by law or ordinance.

(c) The State's Attorney may request and receive from employers, labor unions, telephone companies, and utility companies location information concerning putative fathers and noncustodial parents for the purpose of establishing a child's paternity or establishing, enforcing, or modifying a child support obligation. In this subsection, "location information" means information about (i) the physical whereabouts of a putative father or noncustodial parent, (ii) the putative father or noncustodial parent's employer, or (iii) the salary, wages, and other compensation paid and the health insurance coverage provided to the putative father or noncustodial parent by the employer of the putative father or noncustodial parent or by a labor union of which the putative father or noncustodial parent is a member.

(d) For each State fiscal year, the State's Attorney of Cook County shall appear before the General Assembly and request appropriations to be made from the Capital Litigation Trust Fund to the State Treasurer for the purpose of providing assistance in the prosecution of capital cases in Cook County. The State's Attorney may appear before the General Assembly at other times during the State's fiscal year to request supplemental appropriations from the Trust Fund to the State Treasurer.

CREDIT(S)

1993 Main Volume

P.A. 86-962, Art. 3, § 3-9005, eff. Jan. 1, 1990. Amended by P.A. 87- 845, § 1, eff. July 1, 1992.

2001 Electronic Update

Amended by P.A. 87-1256, § 1, eff. July 1, 1993; P.A. 88-586, § 45, eff. Aug. 12, 1994; P.A. 89-395, § 10, eff. Jan. 1, 1996;

P.A. 91-589, § 25, eff. Jan. 1, 2000.

IL ST CH 55 S 5/3-9005

FORMER REVISED STATUTES CITATION

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Formerly I11.Rev.Stat.1991, ch. 34, 3-9005.

[FN 11 725 ILCS 210/1 et seq.

HISTORICAL AND STATUTORY NOTES

Prior Laws:

R.S.1845, p. 76, §§ 4, 5.
Laws 1871-72, p. 190, § 3.
R.S.1874, p. 172, § 5.
Laws 1953, p. 983, § 1.
Laws 1965, p. 592, § 1.
Laws 1967, p. 3676, § 1.
P.A. 77-1244, § 1.
P.A. 81-917, § 1.
I11.Rev.Stat.1987, ch. 14, 5.

55 I.L.C.S. 5/3-9005

IL ST CH 55 § 5/3-9005

SPECIAL INVESTIGATORS

DUTIES:

Serve subpoenas

Make return of process and conduct investigations which assist the States Attorney in the performance of his duties

Carry a firearm only in the following circumstances: a)permission from the States Attorney, and b)carry States Attorney. authorized ID indicating appointment as Special Investigator, and c)only in the course of assigned duties

Serve as a peace officer and exercise police powers, if and only if a)complete basic police training course mandated and approved by ILETSB, or b)said requirements in (a)above are warranted

Carry tear gas gun projectors, bombs, pistols, revolvers, stun guns, tasers, or other fire arms with the consent of the States Attorney

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Each Special Investigator file should contain:

Oath
Either handbook receipt or contract
Fingerprint Card
Reply from State Police
ILETSB records and status
Firearms Course Certificate
States Attorney authorization for firearm, if applicable

WEST'S SMITH-HURD ILLINOIS COMPILED STATUTES ANNOTATED CHAPTER 725. CRIMINAL PROCEDURE

ACT 210. STATE'S ATTORNEYS APPELLATE PROSECUTOR'S ACT

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210/7.06. Employment of investigators

§ 7.06. (a) The Director may hire no more than 12 investigators to provide investigative services in criminal cases and tax objection cases for staff counsel and county state's attorneys. Investigators may be authorized by the board to carry tear gas gun projectors or bombs, pistols, revolvers, stun guns, tasers or other firearms.

Subject to the qualifications set forth below, investigators shall be peace officers and shall have all the powers possessed by policemen in cities and by sheriffs; provided, that investigators shall exercise such powers anywhere in the State only after contact and in cooperation with the appropriate local law enforcement agencies.

No investigator shall have peace officer status or exercise police powers unless he or she successfully completes the basic police training course mandated and approved by the Illinois Law Enforcement Training Standards Board or such board waives the training requirement by reason of the investigator's prior law enforcement experience or training or both.

The board shall not waive the training requirement unless the investigator has had a minimum of 5 years experience as a sworn officer of a local, state or federal law enforcement agency, 2 of which shall have been in an investigatory capacity.

(b) The Director must authorize to each investigator employed under this Section and to any other employee of the Office exercising the powers of a peace officer a distinct badge that, on its face, (i) clearly states that the badge is authorized by the Office and (ii) contains a unique identifying number. No other badge shall be authorized by the Office.

CREDIT(S)

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P.A. 80-1, 1st Sp.Sess., § 7.06, added by P.A. 81-1057, § 2, eff. Jan. 1, 1980. Amended by P.A. 82-292, § 1, eff. Aug. 19, 1981; P.A. 83-270, § 1, eff. Jan. 1, 1984; P.A. 84-1062, § 1, eff. July 1, 1986; P.A. 86- 9, § 1, eff. Jan. 1, 1990; P.A. 87-677, § 1, eff. Sept. 23, 1991.

2001 Electronic Update

Amended by P.A. 88-586, § 70, eff. Aug. 12, 1994; P.A. 91-883, § 110, eff. Jan. 1, 2001.

FORMER REVISED STATUTES CITATION

1992 Main Volume

Formerly I11.Rev.Stat.1991, ch. 14, 207.06.

HISTORICAL AND STATUTORY NOTES

IL ST CH 725 S 210/7.06 Page 19 .

P.A. 82-292 increased to 4 from 2 the maximum number of investigators to be hired.

P.A. 83-270, in the first sentence, substituted "case and tax objection cases" for "appeals" and added the second sentence.

P.A. 84-1062 substituted "board" for "Commission".

P.A. 86-9, increased the number of investigators to 8 from 4 and added the second, third and fourth paragraphs relating to investigator status and training.

P.A. 87-677 increased the number of authorized investigators from 8 to 12.

P.A. 88-586, in the paragraph requiring investigators to complete basic police training to acquire peace officer status or to exercise police powers, substituted "the Illinois Law Enforcement Training Standards Board" for "the Illinois Local Governmental Law Enforcement Officers Training Board".

P.A. 91-883 designated the subsections and added subsec. (b) relating to badges. 725 I.L.C.S. 210/7.06

IL ST CH 725 § 210/7.06

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Phillip D. Carlson and Thomas Smith *Plaintiffs-Appellees,*	)	No. 01 C 9235
v.	)	**Charles Norgle, Sr.,** Judge Presiding.
Mary E. Gorecki, et. al, *Defendants-Appellants.*	)	

PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF UNCONTESTED FACTS AND PLAINTIFF'S STATEMENT OF ADDITIONAL MATERIAL FACTS PURSUANT TO LOCAL RULE 56.1(b)(3)

NOW COMES the Plaintiffs, PHILLIP D. CARLSON and THOMAS R. SMITH, by and through their attorneys, John P. DeRose and Associates, and responds to Defendant's Statement of Uncontested Material Facts and states additional material facts pursuant to Local Rule 56.1(b)(3)

I PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF FACTS

1. Undisputed.

2. Undisputed.

3. Undisputed.

4. Undisputed.

5. Undisputed.

6. Undisputed.

7. Undisputed.

8. Undisputed.

9. Undisputed.

10. Undisputed.

II PLAINTIFF'S STATEMENT OF ADDITIONAL FACTS PURSUANT TO LOCAL RULE 56.1(b)(3).

1. Barsanti is a former Assistant and First Assistant State's Attorney for Kane County. He joined in the office in 1979. (Ex. 1 at 8). He worked under five different State's Attorneys. (Ex. 1 at 10).

2. Barsanti was the investigator's direct supervisor since January 1986. He is the one who gave them assignments. (Ex. 1 at 27,29).

3. In 1992 Barsanti ran for election for the State's Attorney position. He was defeated by David Akemann. Barsanti lost the primary. Although they were political rivals Barsanti was retained in his position by Akemann after Akemann became the State's Attorney. (Ex. 1 at 77-78). And, there were Assistant State's Attorneys who did not support the State's Attorney politically that continued to work in the office at their jobs. (Ex. 1 at 15-16).

4. No Assistant State's Attorneys who supported Barsanti

were fired after Akemann won. (Ex. 1 at 21-22).

5. Barsanti is not aware of any requirement that Assistant State's Attorneys or investigators in that office be of a certain political persuasion in order to hold their job there. (Ex. 1 at 22).

6. Barsanti characterized the duties of investigator as mainly serving subpoenas. "That was the bulk of it." (Ex. 1 at 23-24).

7. When investigators would be asked to actually investigate, they would have specific factual things to do. For instance he would direct them to take a picture of a particular building. (Ex. I at 24).

8. Trial strategy was not discussed with the investigators. (Ex. I at 24).

9. The Kane County State's Attorney's office had investigators who were paid by the office and also investigators that were assigned there from different departments and paid by those departments. (Ex. 1 at 25). Those investigators did not need to belong to a certain political party in order to work there. (Ex. 1 at 34).

10. There have been known Democratic investigators that worked under Republican State's Attorneys not only as investigators but lead investigators. (Ex. 1 at 37,40).

11. T.R. Smith was one of the best investigators the office ever had. (Ex. 1 at 43-44).

12. No investigator ever made policy for the office. (Ex. 1 at 47).

13. At times investigators would be called upon to give the policymakers information contained in their reports but that was the extent of it. (Ex. 1 at 47).

14. In Barsanti's opinion a requirement of political allegiance is not necessary to carry out the duties of an investigator. (Ex. I at 47).

15. Neither Smith or Carlson ever indicated that they would not do a particular taskbecause it violated their perceptions of political allegiance. (Ex. 1 at 50).

16. Neither Smith or Carlson ever refused an assignment. (Ex. 1 at 51).

17. During Barsanti's tenure, the State's Attorney was not "directly in the loop" regarding investigator assignments. (Ex. 1 at 60).

18. The investigators did not "investigate" in the sense of starting an investigation, developing an entire file and making recommendations. That is not what they did. They did things like serve subpoenas which was the most time consuming job, take pictures, find addresses, and walk off distances with a distance wheel. It was very, very seldom that they took witness statements. (Ex. I at 65-66,91).

19. The investigators "opinions" of witnesses, if asked for, affected only small parts of the jobs of the State's Attorney and his Assistants. (Ex. I at 75).

20. Currently, Akemann is Assistant Attorney General of Illinois. (Ex. 2 at 6).

21. Akemann was the State's Attorney for Kane County from 1992 to through 2000. (Ex. 2 at 7).

22. Akemann never made a condition of employment that any Assistant had to be a member of a certain party or have voted for him. (Ex. 2 at 12).
23. There was never a requirement or condition of employment that any other employees like clerks and secretaries be of a certain political party. (Ex. 2 at 12).

24. Akemann never asked about political affiliations of his civilian employees. (Ex. 2 at 12).

25. Akemann appointed investigators but there was never a requirement that the belong to a certain party or have voted certain ways. (Ex. 2 at 17).

26. Special investigators were appointed without reference to political beliefs or affiliations. (Ex. 2 at 18).

27. Under Ackemann, the First Assistant would give the investigators their assignments. (Ex. 2 at 21).

28. Investigators did not make policy decisions. (Ex. 2 at 21).

29. The investigators job assignments were not dependent on their political party. (Ex. 2 at 22).

30. Democratic investigators worked just as well as Republican investigators. (Ex. 2 at 22).

31. Neither Smith or Carlson ever refused a job assignment. (Ex. 2 at 23).

32. Political affiliation is not a controlling factor in hiring people in the office. (Ex. 2 at 23).

33. Akemann has no knowledge of Smith or Carlson working on political campaigns while at work. (Ex. 2 at 26).

34. The State's Attorney cannot unilaterally appoint a special investigator to assist a grand jury in whatever function they need assistance with. There has to be a motion by a certain number of the grand jurors and the foreperson presented to the court and the court would appoint the investigators based on the motion. (Ex. 2 at 51).

35. Investigator's "input" into decisions about whether to charge someone would be limited to a factual report given to the office. Investigators do not recommend that any particular decision be made as a result of their investigations. (Ex. 2 at 54-55).

36. As far as confidentiality of the investigations, they are confidential to the same degree as any police investigation in that the general public does not attend those meetings. (Ex. 2 at 56).

37. Ackemann understood that as State's Attorney he could not discharge someone from his job for an unlawful purpose like exercising their First Amendment rights. (Ex.2 at 87).

38. State's Attorneys do not have the right to require employees to remain silent if the employee has learned that there had been a breach of the law. (Ex. 2 at 91)

39. Smith and Carlson always observed the confidential nature of the investigations.(Ex. 2 at 89).

40. Carlson was an investigator for the Kane County State's Attorney's Office from May of 1996to December 1, 2000 when he was fired by Mary E. Gorecki. (Ex. 3 at 12).

41. Smith was an investigator for the Kane County State's Attorney's Office for over 2 years until fired by Mary Gorecki on December 1, 2000. (Ex. 4 at 12).

42. Prior to being hired as an investigator with Kane County Carlson had over 12 years experience in investigative work for the Illinois Secretary of State's Office. (Ex. 3 at 3).

43. Prior to being hired as an investigator with Kane County, Smith had over 30 years experience in investigative and law enforcement work for the Cook County Sheriff's Police. (Ex. 4 at 3).

44. As part of Carlson's and Smith's training for investigative work with the Kane County State's Attorney's Office, they attended and successfully completed the Northeast Multi-Regional Police Training Institute Program, a 400 hour training program. (Ex. 3 at 14). (Ex. 4 at 4).

45. Carlson's salary as an investigator with Kane County was paid in part by federal grant money. (Ex. 3 at 5).

46. As an investigator with the Kane County State's Attorney's office, Carlson and Smith were expected to and did the ministerial tasks as assigned to them by an Assistant State's Attorney. (Ex. 3 at 16) (Ex. 4 at 5).

47. Carlson's and Smith's assignments included locating witnesses, serving subpoenas, transporting witnesses to court, and interviewing witnesses for trial under the direction of the Assistant State's Attorneys who gave them the assignments. (Ex. 3 at 7), (Ex. 4 at 6).

48. Carlson and Smith rarely undertook an investigation that was needed by the AssistantState's Attorney's to go to trial or which involved post-trial sentencing. (Ex. 3 at 8), (Ex. 4 at 7).

49. On those occasions where Carlson and Smith were called upon to investigate a matter, their job was to augment the police department's primary investigation by securing documents by way of a subpoena which was prepared by others, getting physical control of the documents, and delivering them to the Assistant who requested them. (Ex. 3 at 19) (Ex. 4 at 18).

50. The investigations done by Carlson and Smith were supervised by an Assistant State's Attorney. (Ex. 3 at 10), (Ex. 4 at 9).

51. Carlson and Smith had minimal professional contact with the State's Attorney while they worked as investigators. (Ex. 3 at 11), (Ex. 4 at 10).

52. Carlson and Smith were never consulted during any policy-making conferences in the Kane County State's Attorney's Office. (Ex. 3 at 112) (Ex. 4 at 11).

53. Carlson and Smith did not participate in any way in the policy-making decisions of the Kane County State's Attorney's Office. (Ex. 3 at 13) (Ex. 4 at 12).

54. Before Carlson and Smith were hired, and during their employment with the Kane County State's Attorney's Office, that office had no "litmus test" of political affiliation necessary to be an investigator. (Ex. 3 at 14), (Ex. 4 at 13).

55. Political affiliation was unimportant to and unnecessary for the tasks assigned to Carlson and Smith as investigators in the Kane County State's Attorney's Office. (Ex. 3 at 15), (Ex. 4 at 14).

56. David Moore was a Special Investigator for the Kane County State's Attorney'sOffice from January 1994 until April, 1998. (Ex. 5 at 1).

57. In May of 1998 Moore left the office when he became the Coroner of Kane County, having been appointed to that position by the Kane County Board where I remained until November 2001. (Ex. 5 at 3).

58. Prior to his hiring as an investigator for the Kane County State's Attorney's Office, Moore had over twenty-eight (28) years experience in investigative work for the Kane County Sheriff's Police. (Ex. 5 at 4).

59. When Phillip Carlson was hired by Kane County State's Attorney David Akemann, Moore was given the responsibility of making sure that Carlson was enrolled in and received all training and certification that was required by the Illinois Law Enforcement Standards Board. (Ex. 5 at 8).

60. Phillip Carlson received all such required training and certification. (Ex. 5 at 19).

61. While employed as an investigator in the Kane County State's Attorneys Office, I was expected to do and did the ministerial tasks as assigned to me by the Assistant State's Attorneys of the office. (Ex. 5 at 10).

62. Assistant State's Attorneys assigned Moore to locate witnesses, serve subpoenas, transport witnesses to court, and interview witnesses for trials they were preparing or presenting. (Ex. 5 at 11).

63. Moore was the lead investigator for the Kane County State's Attorney's Office all the while he was there. (Ex. 5 at 12).

64. When an Assistant State's Attorney needed any follow-up investigation to a case he was working on, he

would request assistance from John Bersanti, the First Assistant State's Attorney. (Ex. 5 at 13).

65. Mr. Bersanti would then review and approve the request and would assign a particular investigator to fulfill that request. (Ex. 5 at 14).

66. On those occasions where the investigator was called upon to investigate a pending or potential case, their responsibilities were to augment the police department's primary investigation by securing documents by a subpoena prepared by others, getting physical control of the documents, and delivering them to the Assistant State's Attorney who requested them. (Ex. 5 at 116).

67. The investigations done and tasks accomplished by Moore for the Kane County State's Attorney's Office were always supervised by the Assistant State's Attorney who requested the particular investigation or task. (Ex. 5 at 17).

68. Moore had only minimal professional contact with the State's Attorney of Kane County while he worked as an investigator in his office. (Ex. 5 at 119).

69. Moore did not participate in any way in the policy making decisions of the Kane County State's Attorney's Office. (Ex. 5 at 20).

70. At no time was Moore ever present in or consulted during any policy making conferences in the Kane County State's Attorney's Office, with one exception. On only one occasion, Moore was brought into a meeting with the State's Attorney and the First Assistant State's Attorney and advised that a chain of command was going to be established for the office on how cases were to be assigned. (Ex. 5 at 21,22).

71. At no time during Moore's employment with the Kane County State's Attorney's Office was there a "litmus test" of political affiliation necessary to be an investigator for the office. (Ex. 5 at 29).

72. Moore has always been a registered Democrat in Kane County, a predominantly Republican County. (Ex. 5 at 30).

73. Political affiliation was unimportant to and unnecessary for the tasks assigned to Moore as an investigator in the Kane County State's Attorney's Office. (Ex. 5 at 31).

74. At no time was Moore's personal integrity and/or his professional reputation ever questioned while he worked as an investigator for the Kane County State's Attorney's Office. (Ex. 5 at 32).

75. Gorecki blamed Carlson for exposing information regarding an alleged kickback scheme the that Gorecki was involved in. (Ex. 6 at 144)

76. Smith authored and circulated a letter criticizing Gorecki and Gorecki knew of its existence. (Ex. 7, Cmplt and Answer at 34-35).

Respectfully submitted,

/s/ John P. DeRose
John P. DeRose and Associates
15 Spinning Wheel Road Suite 328
Hinsdale, Illinois 60521
(630) 920-1111

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Phillip D. Carlson and Thomas Smith *Plaintiffs-Appellees,*	)	No. 01 C 9235
v.	)	**Charles R. Norgle, Sr.,** Judge Presiding.
Mary E. Gorecki, *Defendant-Appellant.*	)	JURY REMANDED

PLAINTIFF'S EXHIBITS IN SUPPORT OF THEIR RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

NOW COMES the Plaintiffs, PHILLIP D. CARLSON and THOMAS R. SMITH, by and through their attorneys, John P. DeRose and Associates, and offers the following exhibits in support of their response to Defendants' motion for summary judgment and statement of additional material facts pursuant to Local Rule 56.1(b)(3).

Exhibit No. Description

I Deposition of John Barsanti.

2 Deposition of David Akemann

3 Affidavit of Phillip D. Carlson

4 Affidavit of Thomas R. Smith

5 Affidavit of David W. Moore

6 Report of Proceedings before the ARDC, In Re: Matter of Gorecki

7 Letter from T.R. Smith dated 11/3/2000

Respectfully submitted,

/s/ Anthony T. Capus
John P. DeRose and Associates
15 Spinning Wheel Road Suite 328
Hinsdale, Illinois 60521
(630) 920-1111

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Phillip D. Carlson and Thomas Smith *Plaintiffs,*	)	
v.	)	No. 01 C 9235
Mary E. Gorecki, et al., *Defendants.*	)	

THE DEPOSITION OF JOHN BARSANTI, called by Plaintiff, for examination, taken pursuant to the Federal Rules of Civil Procedure of the United States District Courts pertaining to the taking of depositions, taken before JEAN M. HINCKS, a Notary Public and Certified Shorthand Reporter within and for the County of Cook and State of Illinois, taken at 15 Spinning Wheel Road, Hinsdale, Illinois, on the 11th day of July, A.D. 2002, at 2:10 P.M.

REPORTED FOR ADVANTAGE REPORTING SERVICE
BY: JEAN M. HINCKS
CERTIFIED SHORTHAND REPORTER
REGISTERED PROFESSIONAL REPORTER

Direct-Examination by Mr. DeRose 4
Cross-Examinabon by Mr. Bcrsani 51
Re-Direct Examination by Mr. DeRose

Exhibits Identified:

Exhibit No. 1	51
Exhibit No. 2	82
Exhibit No. 3	84
Exhibit No. 4	107
Exhibit No. 5	109

PRESENT:

THE LAW OFFICES OF
JOHN P. DeROSE L ASSOCIATES
BY: MR. JOHN P. DeROSE
15 Spinning Wheel Road, Suite 329
Hinsdale, IL 60521
(630) 920-1111

On behalf of the Plaintiffs:

THE LAW FIRM OF HERVAS, SOTOS, CONDON 6 BERSANI, P.C. BY: MR. MICHAEL D. BERSANI
333 Pierce Road, Suite 195
Itasca, IL 60143
(630) 773-4774

On behalf of the Defendant,
Mary E. Gorecki, State's Attorney of Kane County;

ALSO PRESENT:
Ms. MEG GORECKI
State's Attorney

MS. M. KATHERINE MORAN
Assistant State's Attorney;

MR. ALLAN R. STASICA
Assistant State's Attorney;

AND
MS. SHARON LAW LARSEN
Attorney-at-Law.

(Witness sworn.)
JOHN BARSANTI,
called as a witness herein by the Plaintiffs, having been first duly sworn, was examined and testified as follows:
DIRECT-EXAMINATION
BY: MR. DCROSE
Q Sir, will you please state your name for the record?
A John Barsanti.
Q Mr. Barsanti, have you ever given a deposition before in your experience?
A Yeah, I have.
Q Because I don't know what that experience might have been, it might have been in a state court, it might have been in a federal court, I'm going to give you a little preamble as to what you can expect There and because the rules of the different court systems do vary from court system to court system We are going to be taking this deposition according to all the applicable rules of the Federal District Court for the Northern District of Illinois, the appropriate rules of the Seventh Circuit Court of Appeals, and of the United States Supreme Court that apply to the taking of .depositions. During the course of this deposition, to make sure that those rules are followed, counsel from time to time will interject, and you being an attorney probably understand that they have a unique way of interjecting. Sometimes they use a word like objection, but however counsel does interject, if you hear the attorneys in the courtroom -- or in this deposition room start to talk, if you could just stop talking until we have an opportunity to

discuss on the record whatever the objection might be, we would all appreciate that.
In the course of the taking of this
deposition, we do not want you to guess. If you do not know the answer to a question, there's no harm in telling us I don't know, or if it's something you believe you did know at one time but have since lost from the lexicon of your memory, you can tell us I don't remember or I have forgotten, and we will understand that.
During the course of this deposition,
we will be taking periodic breaks, but if we have notcalled a break soon enough for your own personal
comforts and needs, if you'll let us know -
A Fine.
Q -- we'll be happy to interrupt the proceedings for whatever purposes are necessary.
You are not represented by an attorney
here today, is that correct, sir?
A Correct.
Q And you are here pursuant to a subpoena?
A 1 don't think I am.
Q I didn't give you a subpoena?
A No.
Q I know you did indicate that you wanted a subpoena
A Right.
Q -- and if you do need a subpoena still -
3 A No, that's fine.
Q In the course of taking this deposition, we
need verbal answers, of course, to any questions
that are asked. The reporter will take down verbatim
everything that is said here today.
Do you have any questions about the
proceedings before we start into them?
A No.
Q. Mr. Barsanti, by whom are you employed at this time?
A By the Law Firm of Camic, Johnson, Wilson, &

McCulloch. I have several jobs, actually. Do you want me to give them all to you?

All right. Go ahead.

A I'm employed by the Law Firm of Camic, Johnson, Wilson & McCulloch of Aurora. I have a contract with the Illinois State Appellate

Prosecutor's Office, and I also am employed -- I am a contractor with Kane County to be what they call a conflict counsel.

Q.Let me just back up a little bit with you. The Illinois State Appellate -- did you say Defender's Office?

A Prosecutor's Office.

Is that a part-time job?

A It's a contract. I bill them. They assign me to do certain things, and then I bill them.

Q. And your full-time or your most -- the practice that takes the most of your time, I take it,

is the Camic, Johnson firm?

A Right, right.

Q Then you indicated you have a third practice as a conflict -

A Counsel, right, within Kane County. If the Public Defender cannot be involved in a criminal case because they have a conflict, usually when there's multiple defendants, then I get involved in that, and that usually takes the form of juvenile court. That's the bulk of it is juvenile court.

Q And your work in that capacity would be as a defense lawyer?

A Well, in juvenile court, it depends.

Sometimes you're a guardian ad litem and things like that. You can play different roles, but I'd say probably most of it is as a defense attorney.

Q Mr. Barsanti, I know that at one point you were an Assistant State's Attorney for Kane County, is that correct?

A Right.

Q When did you first become an Assistant State's Attorney

for Kane County?
A October of 1979.
Q And was that an assignment immediately upon your completion of law school?
A No. I finished law school in -- I took the bar in July of 1977, and then in like March or February of 1978, I started with the Illinois Department of Labor, and then I worked there. In November or October of '79, 1 signed on with the State's Attorney's Office.
Q And who was the State's Attorney when you first signed on with Kane County?
A Gene Armentrout.
Q Could you spell that last name?
A A-R-M-E-N-T-R-O-U-T.
Q And what was your titled position with the State's Attorney Office at that time?
A Assistant State's Attorney.
Q After Mr. Armentrout completed his teen as State's Attorney, did you continue with the office for an additional period of time?A Yes.k
Q For how much additional period of time did you remain with the Kane County State's Attorney Office?
A Till whatever the last day in November is,
the 30th, I think, November 30, 2000.
Q And over the period of time that you were
with the Kane County State's Attorney's Office, how
many different State's Attorneys did you work under? 5
A I think it's five; Armentrout, Morrow,Casey, Johnson, and
Q The first of those names, Morrow, how would
iyou spell that?
0 A M-O-R-R-O-W.
Q Were these all male State's Attorneys?
A Yes.
Q Under Mr. Morrow, what was your titled
position?
A He came in in December of '80. 1 was an

Assistant State's Attorney until January of '86 when dhe appointed me chief of the Criminal Division.
Q Before he appointed you to the position of chief of the Criminal Division, what were your duties and assignments as an Assistant State's Attorney?
A Under Armentrout, I was in juvenile court, and Morrow put me in as a felony trial assistant, and I was a felony trial assistant from when he came in, which would be December of '80, until he made me chief of the Criminal Division.
Q. And then when he made you chief of the Criminal Division, did your duties and responsibilities change in some fashion?
A Yeah.
Q. How did they change?
A As a trial assistant, all I did was work files. That's all I had to do, and we also had a felony screening function where we'd all take turns similar to felony review that they have in Cook County, similar to that, where we took turns doing that a week at a time, but I just worked files assigned to me. Now, when I was promoted, at that point, I did -- I supervised every criminal case, every criminal assistant, and I made every single deal, every single plea bargain was approved by me. I ran the grand jury completely. I did every grand jury hearing and every grand jury investigation and then still prosecuted. I still had some files, too.
Q. So, every single prosecution in the county then would have passed through you at that point -
A Right.
Q. -- when you were running the grand jury proceedings?
A There was a lot less then than there is now, but yeah, that's the way it worked.
Q Then after Mr. Morrow was no longer assistant or no longer State's Attorney, you then worked under Mr. Casey?
A Right.

Q What was your titled position under Mr. Casey?
A I think he kept everything the same. Morrow left midterm or almost near the end of his term. He ran for judge and he lost, and then he went to private practice; like sometime in early '88 I believe he left office. I can't remember the time, but shortly before the end of his term he left.
Casey was appointed by the Kane County Board to be the interim State's Attorney, and he really didn't
change anything. I still retained my position as chief of the Criminal Division under Casey.
Q Did Mr. Casey then after completing the term of Mr. Morrow run himself for State's Attorney?
A No, no. I think that was the deal he
couldn't run or something like that, I think, if I
recall how that went. That was his stipulation thathe wouldn't run, and after him came Gary Johnson.
Q And under Mr. Johnson, what was your titledposition?
A First Assistant.
Q And immediately upon Mr. Johnson becoming State's Attorney, did you get appointed as First Assistant?A Yeah, yes.
Q Now, as First Assistant State's Attorney,you were the highest State's Attorney in the office under the State's Attorney, himself?
A Right.
Q What were your duties and responsibilitiesthen under Mr. Johnson?
A Well, I don't know that they were all that different than what I did before. In fact, I would say they were the same. Just by title, I hads upervisory authority over the people in the Civil Division, which I never had before. That really was more of a -- I think that was probably more -- I didn't do much in civil. I had a very limited supervisory role. I helped pick the chief of the1 Civil Division. I really didn't -- wasn't involved in any of their stuff that they did, except in a very

tangential way. I think the State's Attorney probably was more involved in that than I was, but for the most part, my job remained the same.
Q How long did you remain First-Assistant under Mr. Johnson?
A His whole term, for those four years.
Q And after his four-year term, you remained in the employ of the Kane County State's Attorney's Office under Mr. Akemann?
A Yes.
Q What was your titled position under Mr. Akemann?
A When Mr. Akemann came in, he abolished the job of First Assistant. So, there was no First Assistant. He made me chief of the Criminal Division, and he had a chief of civil, and I think after a while he had chief of juvenile, too, I don't remember, but that was my title, and for the most part, my job really didn't change.
Q So, your job then as both chief of criminal under Mr. Casey and Mr. Akemann and your job as First Assistant under Mr. Johnson, as far as you're concerned, was very similar under all of those persons?
A Even when -- when Morrow made me chief of the Criminal Division, he had a First Assistant, and he didn't have a First Assistant after that either. So, yeah, for those periods of time, it was the same.
Q. Have you ever run for political office?
A Yes.
Q. What political offices have you run for?
A Kane County State's Attorney.
Q. And when did you run for Kane County State's Attorney?
A 1992.
Q. So, you would have ran against Mr. Akemann? A Yes.

And Mr. Akemann defeated you for the position, is that correct?
A In the primary, right.
Q. Now, after Mr. Akemann ascended to the position of Kane County State's Attorney, was there any discussion between you and him as to whether or not your position with the Kane County State's Attorney's Office was going to be eliminated?
A You mean as the First Assistant?
Or even as an employee.
A See, I'd known Dave for a long time because he had been in the office when I was there. When I first started, he was in the Civil Division, and I think he was chief of Civil Division for a while, and when Gary came in, he left. I didn't know where he was working at that time. So, after I lost, I went to Akemann, and I told him that I wanted to remain with the office, and he said, well, let's give it six months and see how it turns out. I thought that was a good idea, and after six months or so, you know, things were working out okay, and I remained.
Q. As the chief of the Criminal Division, did you have under the various State's Attorneys that you worked responsibilities for developing policy in the office from time to time?
A Yes.
Q. The first time in your opinion you were involved in a policy-making position under which State's Attorney would that have been?
any support among those people for your candidacy?
A I couldn't tell you that everybody did, but a great number of them did. I think at the time my wife was a clerical employee in the office. So, we knew a lot of those people pretty closely.
Q. The investigators, the civilian investigators in the State's Attorney's Office, did you have the support of any of them for your candidacy to be State's

Attorney?
A Yeah, yes, You know, I'm trying to think about that period of time, and I'm thinking there was a guy named T.J. Strickland was an investigator, and also, there was a guy named Frank Knight, who was a Batavia police officer. Strickland had been an Elgin police officer,
iQ And as you remember it, did Mr. Strickland
and Mr. Knight support your candidacy? i A Yeah.
Q When you lost in the campaign against
Mr. Akemann, do you know whether any of those Assistant State's Attorneys who had supported your candidacy were ultimately terminated from their employment after Mr. Akemann became State's Attorney?
A I don't remember anybody. I would say no.
Q. Was there, to your knowledge, any of the
civilian employees, clerical help or investigators,
who lost their employment because they had supported your candidacy after Mr. Akemann ascended to his position?
A No, not that I know of.
Q As far as you understood it in Kane County, was there a requirement that one be a member of a particular political party in order to be an
Assistant State's Attorney in Kane County over the years that you had been working in the office?
A No, I was never aware of that.
Did there exist in Kane County during the
Period of time that you were an Assistant State's
Attorney, the chief of the Criminal Division and
t later First Assistant State's Attorney, ever a requirement that investigators be members of a Particular political party?
A Not that I'm aware of.
Q. Over the period of time that you were
working in the Kane County State's Attorney's Office,
did you yourself, become involved in working with the 2 investigators in the State's Attorney's Office? 3 A Yes.

Q Did your involvement with the investigators 5 change over the period of time that you were in the 6 office from its inception until finally when you 7 left?
A Yes.
Q How initially was your involvement when you 1o were a trial Assistant State's Attorney? What i I initially was your involvement with the 12 investigators?
A Early on, I'm going back to when I was just an assistant, the investigators served paper, served subpoenas, because at the time, the Sheriff's
Department was -- the opinion was -- and I was just working within the policy of the office, but the opinion was the Sheriff's Department didn't serve subpoenas all that well, and the only way we could really count on subpoena service getting done was to have our own investigator do the subpoena service, and that was by far the bulk of it. When I was an
assistant, I would need to get somebody subpoenaed,
and I would instruct an investigator to go and subpoena somebody or take a photograph. Sometimes that would happen, or in limited situations, go and interview a witness that may testify and things like that. That was my involvement as an assistant. I would characterize that as trial assistant. That was my involvement with them.
Q. And this would be when you were working in preparing cases for presentation, prosecutions in the court system?
A Right.
Q. Would these investigators then work in conjunction with you in making that preparation, follow your direction?
A Yeah. I told them what to do, and they
would go and do it. I mean, I didn't sit down with them and discuss trial strategy or anything. It was just really basically a function of: I need a photograph of that building and I need it by tomorrow and could you go out there and do it, and that's really what they did for us.
Q. During that period of time that you were an

Assistant State's Attorney using the services of the investigators for your courtroom presentations, were any of those investigators ever involved in any policy-making decisions in your office?
A When I was an assistant?
MR. BERSANI: Are we talking about investigators employed by the Kane County State's Attorney's Office; is that what you're talking about?
MR. DeROSE: Yes, that's what I'm asking about. gy MR. DeROSE:
Q. First of all, let's clarify that. When I talk to you about investigators in the Kane County State's Attorney's Office, are there different kinds of investigators?
A I suppose I'd have to answer that by saying at what period of time?
When you were an assistant.
A In the early days when I was an assistant, there were very few investigators. I think the most that I ever recall having is two, and there were some that -- during that period of time, there were some that were directly hired by the office and paid by the office, but there were times when we had assigned people from like the Sheriff's Department, if I recall, once or twice we'd have people assigned to 2 us, but my recollection is most of them were 3 employees.
Q. Employees of the State's Attorney's office? A Right.
Q. We're talking about those early years now when you were an Assistant State's Attorney. Do you remember the names of the investigators who were hired by your office to be investigators at that time?
A My earliest recollection of an investigator is a guy named Ray Schuett, who was a retired Geneva policeman. I think he was there when I started.
Q Could you spell his last name?
A And this is a guess, S-C-H-U-E-T-T.

Q Was there any other investigator in those
early years that you remember besides Mr. Schuett
hired by the office? 18
A We had Wayne Henke.
Q Spell his last name.
A H-E-N-K-E. He was a retired Elgin
Policeman.
Q Anyone else you remember?
A We had a guy -- I can't remember his name. He later died of cancer. I can't recall his name. I don't think he'd ever been a police officer, and I'm
sure there were others that I can't recall.
Q. Do you remember the names of any of the investigators that had been assigned or detailed to your office from the Sheriff's Department in those early years?
A We had some people detailed to us from other bigger departments. We had a guy named Ray Weaver detailed to us from Aurora; I remember that.
Q. That would be W-E-A-V-E-R?
A Yeah, and it seems to me we had -- I'm not
even sure about this. What name comes to my mind is a guy named Ken Anderson for a while from the Sheriff's Department who was detailed to us. There are others. I can't recall their names.
Q. Now, when you then ascended to the position of chief of the Criminal Division, you indicated that your responsibilities in the office were increased dramatically, is that correct?
A Right.
Q. Did your contact and supervision over
investigators change in any way once you became chief 2 of the Criminal Division?
A Yeah. I became their boss, their direct 4 supervisor.
Q Now, do you remember the names of the
investigators who were actual employees of the Kane 7 County State's Attorney's Office when you were s working

as chief of the Criminal Division under
Mr. Morrow?
A Wayne Henke was under both those administrations, I recall that.
Q Anyone else?
A I'm drawing a blank now. There was a long line of them. As I sit here, I'm not being able to dredge up any other names.
Q But as the direct supervisor of the
investigators for the Kane County State's Attorney's Office, what was your actual contact with them? What were you responsible for with them?
A I gave them assignments.
MR. QERSANI: what time period are we talking here?
MR. DCROSE: I'm asking about under Mr. Morrow,
.and then I'm going to go on.
By MR. DeROSE:
Q Now, Mr. Morrow was State's Attorney under what period of time?
A I think 'SO to '87, approximately.
Q And when about was it that you became chief of the criminal Division?
A January of '86.
Q. So, from 1986 to the end of Mr. Morrow's ten, you gave the assignment to the investigators, right?
A Except this is what we used to do with it.
Keep in mind that that office was a lot smaller at that time. If a felony assistant needed paper to get served on somebody, he would go directly to the investigator and say, Could you serve this paper now? If there were disputes involved or because we only had -- for a period of time, we only had one guy, and his jobs were divided. If I told him to do something and somebody would come in with a subpoena that needed to get served, I would mediate that and direct him which one to do, and that kind of thing, but the assistants didn't have to clear it through me to get

a subpoena served, but other than that, though, it had to be cleared through me.

Q. Sometime after that initial direct supervision, did you develop some kind of a system that changed the way in which assignments were given to investigators?

A I didn't actually develop a written system or even a system -- any kind of formal system until after Akemann came in.

Q So, it was more -- sounds like a more catch-as-catch-can by whatever assistant who could find an investigator who had some time to do whatever assignment he wanted until you developed this new system under Akemann?

A Right.

Q. This system you developed under State's Attorney Akemann, when did you do that, immediately after he took office?

A No. My recollection is that we started -we put that into place when we went to the new building. That would have been '93.

Q. And who was involved in putting the new System into practice in '93?

A Me.

Q And you just got approval from Mr. Akemann?

A Well, my remembrance of this is that I told 4 David that I think we need to take a little tighter 5 control over what the investigators did because we 6 had a lot more cases, and at that time, the office 7 changed in this sense, is that Akemann brought in 8 this idea that we -- and we paid private subpoena 9 service. So, the actual investigators only served what I always called panic subpoenas. You know, it's Saturday night and you realize you don't have this guy's papers. The investigators would do panic subpoenas, but for the most part, we had private subpoena service, which was paid for out of the

budget. So, what happened was that freed up some time for the investigators to do some other things, and because of that, I thought we needed to put some procedures in place about the stuff they did because they were doing more than serving paper at that time, and so, I talked it over with Dave. He said, yeah, do what you want, and then I put something together, and I had him look at it, and I said he thought that was all right, and then we put that in place.

Q Under Mr. Akemann, how many investigators did you have?

A Well, again, you have to think about periods of time on this because it changed. Early on, we had two.

Q Who were they?

A They were Dave Moore and Phil Carlson. Now, 8 sometime after that, I think it was '94, they opened 9 a Child Advocacy Center, which was -- it escapes me exactly how that was funded early on, but if I remember correctly, there was a grant funding in that or else it was just like a line-item funding from the county board, and part of the charter or the proposal 14 for the Advocacy Center, which I didn't have anything to do with at the time, was investigators, and when the Advocacy Center started going, there was some money there for investigators. Now, early on, it wasn't much, and we took people in from -- we took people from the various departments like Aurora and Elgin, various police departments, were assigned to the office as investigators for the Advocacy Center but were not paid by us. They were paid by their respective departments, and it was sometime after Akpnann came in, I'm thinking this is like '96 maybe, thing like that, they received some domestic violence grant, we received some domestic violence grant, of which written into that grant proposal, again, of which I didn't have

anything to do with at
the time, was investigator.
Q. And was an investigator then hired?
A yeah. We filled all those investigator
spots.
Q Do you remember the names of the investigators that you hired with the grant funds?
A I think the first domestic violence investigator was a guy named Jim Kintz, my recollection of it.
Q. Can you spell Mr. Kintz' last name?
A K-I-N-T-Z. He was a retired St. Charles policeman, and the Advocacy Center investigators changed a lot because we always got the feeling they dumped their worst guy on us, and it was not a good situation, and that changed a lot over a period of time. So, I don't know, and sometime in there, we had another position, and a woman by the name of Ramona Piec was hired.
Q. Can you spell Ramona's last name?
A P-I-E-C.
Q. Now, are you the person who interviewed Mr. Kintz and Miss Piec for -
A I had nothing to do with Kintz. Kintz was hired before -- when I was chief of the Criminal Division and not First Assistant, I had nothing to do with hiring other than my own assistants. The rest of the hiring in the office, which would be support staff, the Civil Division, the Juvenile Division, things like that, were done -- they had nothing to do with me. Kintz was hired. I didn't have anything to do with Ramona Piec I hired. I Interviewed her. That was later on.
Q.as there any requirement as to -- or any
inquiry by you as to what her political allegiance was by way of party politics when you hired her? A No.
Q Now, you mentioned that there were two investigators in the Criminal Division that were funded you believe -- their salaries were funded by

the county, Kane County, Mr. Moore and Mr. Carlson?
A Right. Moore I think -- I could be wrong
about this, but I think when Moore first came on he 2 was assigned by the Sheriff's Department to us.
Q Did he at some time later then become a paid employee
A.He retired at some point from the Sheriff's
Department, and my recollection is that then we paid 7 him.
Q Did he have a titled position with your office other than investigator?
A No. He might have been chief investigator. I I When Phil came on, I think we made -- if not in title, at least in practice, because Dave had more
criminal investigation experience at the time. Dave
had like 25 years with the Sheriff's Department. He was like the lead investigator. I forget which terminology we used, but he was like the No. 1 investigator.
Q Did you have any input into the hiring of Mr. Moore as an investigator after he left the Sheriff's office?
A I think I did. I think that was about the 22 period of time when I started to do that. I was eing asked to be involved in those decisions a lot ore.
Q. Was there any requirement when you hired Mr. Moore as an investigator for the Kane County State's Attorney Office as to what his political allegiance was?
A I knew what it was.
What was it?
A He was a Democrat, I knew that. I don't
recall it ever coming up in an employment interview, though.
Q. So, there was then, I take it, no requirement as to what political party he had allegiance to in order to hold a position of investigator in the office?
A Right.
Q. Phil Carlson, did you have input into the decision to hire him?
A I don't know that I had any input in that decision. I

remember when -- I think Phil ran for clerk. I may have the years goofed up. I think after Phil ran for clerk and lost, I think then he
came on with the State's Attorney's Office, I think.
Q.Do you know who hired him?
A ave, and I remember Phil coming on, and my recollection is that Dave said, what do you think of phil Carlson coming on as an investigator, and he put it past me, but that was neyer put to me in a situation like that I was involved in making the decision on Phil. I think he asked my input. Maybe Iny input would have made a difference, but my understanding at the time was that this was someone that Dave had selected, and I had no objection to it at the time.
Q.s there, as far as you understood it, any requirement that an investigator at that time of these hirings that that investigator be a member of one or the other political party?
A No.
Q. a matter of fact, from what I'm hearing
you say, Mr. Moore was a Democrat and Mr. Carlson was a Republican?
A Right.
Q. Now, when you changed the procedures in
approximately '93 where you got tighter -- you
indicated you changed the procedure to gain tighter control. What did you do to the procedure that gave
you the more tight control over your investigators?
A See, everything up to that time -- I think
you described as catch or catch-can. That's about
exactly the way it was. There were really no records
of the cases they worked, and there were really no
files about investigations they might have been
working on, and because we were getting much busier,
I think, you know, we doubled in prosecutions and
case filings within a very short period of time. I really felt we needed some control over what everybody was doing. So, I developed a protocol for the assistants on what they should

do. I developed the protocol for the investigators of what they should do and a series of forms, among them like an investigation form, which an assistant was required to fill out with certain information, which they'd give to me, which required my signature before the investigator would be required to perform the work, that that was laid out then. Now, that would apply for subpoenas still at this point in time because we had a separate subpoena setup where we had a person that logged the subpoenas whenever they were issued because there was a great deal of them at this time, logged subpoenas, and then if there was a panic subpoena, though, that had to get approved by me. If they wanted the investigators to serve subpoenas, themselves, that had to get approved by me.

One other thing that we did at that
time was to -- this was during the period of time when the law of grand juries changed drastically, and the old thing we used to do would be to have them issue a subpoena, and then we would mail a subpoena to somebody to get grand jury information. There was a case out of DuPage County and Will County where they found that to be an error, and you had to appoint people to be grand jury investigator.

So, at times, when we needed -- like
the grand jury was going to be -- we wanted to subpoena phone records, for example, the grand jury wanted a phone record, I would have them issue the subpoena, then I would appoint one of these guys sometimes, one of the investigators sometimes, to go and actually serve the subpoena because that in my view was what the new law required. So, they got involved in that, too, which they had never been involved in before.

Q As your chief investigator, I think you
called him, Mr. Moore, did he have any further responsibilities as you were setting up this protocol over the other investigators that you had in the office?

A The only person I think he had -- it's much

looser than saying there was a supervisor. I think he was the lead investigator over Phil, and that was more of a corroborative effort than it was actually
Dave more, you know, laying down rules and giving him specific assignments. I think they more or less discussed what each other were going to do, that was my understanding of their role, but Dave was the lead guy. I don't believe Dave had any supervisor authority over any of the other investigators.
Q Besides Mr. Moore and Mr. Carlson, what other investigators did the office employ under Mr. Akemann?
A Again, periods of time would change this, because when the domestic violence grant came, we hired an investigator. When the Advocacy Center started to go, there was a series of investigators that worked there, and near the -- we, I was made
First Assistant again in December of '98 by
Mr. Akemann, and that year we drew up a budget for the 4-D, the Child Support Unit, and we wrote an investigator into that budget, too.
Who did you hire?
A I think Ramona Piec was paid out of that budget, at least partly. I'm not real clear on how that worked at the time, but there was money in the child support, the brand new child support budget,
0 which had to get approved by the state for an
1 investigator, and an investigator at some point was
2 hired under that.
3 Q Did Mr. Thomas Smith become an investigator 4 at some point under -
5 A At some point in time, I think Tom Smith
6 came on after Dave left. That's my recollection of
7 how Smith came in.
8 Q Who hired him?
9 A That was a similar situation as with Phil.
Dave brought me in one day and said what did I think 1 of

T.R. Smith, and I knew him, and he said if I had ,2 any objection, could think of any reason not to hire 3 Smith, and I said no.

Q. How did you know Mr. Smith before his hiring?
A I think he was involved in somebody's political campaign. I can't remember how that was. I think he was a committeeman, and I was a committeeman. So, I think there was some Republican party politic thing that we knew each other from. He was a Cook County deputy. So, I had really no law enforcement experience with him.
Q. In determining the qualifications of individuals to be investigators for the Kane County State's Attorney's Office, did you ever consider the background of these applicants for these positions and was that important in any way?
A Well, the background was, yeah.
Why is that?
A Well, we wanted -- keep in mind, I had -- I don't know that I ever interviewed an investigator until later on after I was First Assistant. I know I might have been consulted when I was chief of criminal and maybe my opinion was asked for, but didn't personally interview investigators until later, because at some point in time, I changed the policy. I interviewed everybody. I interviewed every secretary, every lawyer, everybody, but before that, when I interviewed investigators, we needed some kind of background which would be useful in what they did. It didn't necessarily have to be police background because I think near the end we hired - we had guys who had been probation officers and things like that, but I didn't necessarily need a police background as I needed somebody who had some kind of knowledge of the system or at least some kind I I of knowledge gaining and gathering information and things

like that.
Q Once Mr. Smith joined the office, did you
observe his work as investigator for the Kane County State's Attorney's Office? 16
A Very closely. He worked directly under me.
Q And can you describe your opinion of his ability to do the kinds of functions that were required of an investigator in the Kane County State's Attorney's Office?
A Well, he's one of the best investigators we 22 ever had, I thought. I don't know that there's anybody ever better than T.R. because he had a lot of police background and very cooperative, and a part of being an investigator at that time was these crazy jobs like: Can you go pick up this guy at the airport Sunday night at 10:00 p.m., things like that, and if somebody was flying in from another state.
We used to have a pathologist from
Cook County who did our autopsies who didn't drive, and somebody had to pick him up from the train station at 6:00 o'clock in the morning, and stuff like this. Those are the kinds of things that they had to do, and besides being able to know how to interview people and understand about what investigators did, they needed to be able to cooperate with us on those kinds of things, and T.R. was very good in all that stuff, very cooperative.
Q You as chief of the -- well, strike that.
You, as First Assistant State's
Attorney, I take it, were privy to and part of the policy-making decision arm of the Kane County State's Attorney's Office?
A Right, I was.
Q When you were chief of the Criminal
Division, were you also part of the policy-making arm
of the Kane County State's Attorney's Office? t'A Yes.
Q And when policy-making meetings were being
who would be in those meetings?
A We had a regular weekly meeting. This is

under Akemann, because before Akemann, it was just me ad die State's Attorney most of the time. They weren't regularly scheduled. Under Akemann, he had regularly weekly meetings in which the chiefs of the divisions would be present; that would be civil, criminal. For a while, we had the guy who was head of the misdemeanor traffic area, the administrative chief, and then the person who was running the AdvocaeY Center at the time, I think that was the crew, and they would be -- I don't know if I said juvenile, but juvenile was in there, too. We'd come to this weekly meeting at which policy issues were discussed, but there would be times when Akemann would want you to come in, and we'd sit in his office, and it may be just me and it may be me and some other chiefs, things like that, where we would discuss issues, policy issues.

Q And prior to this weekly meeting that you remember taking place under Mr. Akemann where there would be policy meetings, do I understand you to say it would only involve whoever was the State's Attorney at the time and yourself?

A Yeah. It was very informal, it was very informal. I don't know that we ever had a real formal meeting like that prior to Dave; I don't think we ever did.

Q At any time when you were an Assistant State's Attorney or the felony assistant or the -excuse me -- the chief of the Felony Division or the First Assistant, at any policy meetings that you personally attended, did you ever have an investigator from the office participating in those policy-making meetings?

A They weren't a member of those meetings, but there were times when there may be an issue which we were all dealing with that may have -- an investigator may have had some information on when they were called in to give a report or something like that. Investigators were present at times during those meetings as were assistants at times and other people at times were present to give input, but

this was a pretty -- he didn't want -- I'm talking about Akemann. He did not want anybody usually who wasn't part of this supervisory crew to be involved in there because in his mind he wanted to be able to speak openly without having to worry about offending somebody who he didn't want to offend.

Q. In the years of experience you had with the Kane County State's Attorney's Office, was any investigator ever, in your experience, allowed to make policy for the office?

A No.

Q. Did any of the State's Attorneys under whom you worked ever in your presence require knowledge of the political party allegiance of any of the investigators who worked in the office?

A No.

Q. In your experience and in your opinion, was the requirement of political allegiance necessary in order for an investigator to do the work of investigator for Kane County State's Attorney's Office?

A No.

· You've already voiced your opinion as to the quality of work performed by Mr. Tom R. Smith as an investigator for the Kane County State's Attorney's Office. I ask you, do you have an opinion as to the quality of work that Phil Carlson performed as an investigator for the Kane County State's Attorney's Office?

A Yes.

· What is that opinion?

A When Phil first came on, he was not familiar with police work, which there's a part of that job that requires some familiarity with it. He wasn't familiar with the Criminal Code at that time. Parts of it he might have been, like the Vehicle Code, but the Criminal Code he was not. He had never been a -or performed a role like a police investigator before. So, those kinds of things he was not used to or had a lot of background in.

Now, there are other things which he
did know a lot about. He knew the county. I mean, you say there's a tree on Sheffield Road that's three quarters of a mile down from the gate, and be would know where that was. If you had to find somebody in Aurora who could find a person for you, Phil could do
He had a really long history and knowledge of
county, just the county itself, which was very
helpful. You have to find people or you had to serve
:paper on somebody, he would be able to do that.
Phil is a very tenacious kind of a guy.
You would give him some kind of thing to do, and he
would follow it through until it was done. Those kinds of qualities were good, and he was willing to
go out and beat the bushes for you and drive a guy at 2:00 o'clock in the morning someplace if you needed
to get done. He was cooperative in that area, and early on, Phil and I kind of were at -- we didn't get along all that well early on because he perceived me as trying to tell him how to do certain things, and he was absolutely right. I had an idea of how he should do things, and I don't think he appreciated it because early on he wasn't used to writing a report about something, and I'd get a report, and I didn't think it was good or I didn't think it told me what I
asked him to find out, and I would send it back, and I'd say, do this, and Phil, who had come from a long
line of being a self-employed guy, to basically -and when he worked for the Secretary of State, I
understand he had pretty much a free rein of what he did, to having somebody come in who was obviously younger than he was and to tell him exactly what I wanted him to do and then arguing with him at times about what I needed to get done. He didn't like that very much, but as time goes on, it got smoother. He got much more cooperative with that, he learned a lot more, and by the time we ended, I mean, Phil could write a good report. I was satisfied with his reports.

He and I were able to discuss things that needed to get done, and he picked it up fairly quickly and was very productive.
Q Did you believe then that he was able to do
all of the job responsibilities that you gave him an investigator for the Kane County State's Attorney's Office as you trained him to do?
A Yes.
Q Did either Phil Carlson or Thomas R. Smith at any time tell you that they wouldn't do a Particular task because it violated their perceptions of political allegiance in any way?
A No, no, never.
a.. Q At any time did they ever refuse to do any
of the tasks that you assigned them?
A Never.
MR. DCROSE: I have no further questions. Counsel, you may inquire.
MR. BERSANI: Okay. CROSS-EXAMINATION BY: MR. BERSANI
Q. Mr. .Akemann was the elected State's Attorney while you were working with the State's Attorney Office, correct, from approximately what, 1990?
A '92 till 2000, yeah.
Q. As the elected State's Attorney, Mr. Akemann was the final decision maker in the office, correct?
A Yeah, that would be accurate. There were a
great many decisions that were made that we didn't
bring to him because we felt they were just routine.
Q. Ultimately, though, if he didn't agree with something that you did or a decision you made, he could override that?
A Yes, absolutely.
Q. Essentially, as an Assistant State's
Attorney, as a First Assistant, as the chief of criminal, whatever position you held, when you acted
Page 52 on behalf of the office, you basically stood in the shoes of Mr. Akemann, correct?
A In his name, right.

Q. Are you familiar with the powers and duties of the State's Attorney as defined by statute?
A I couldn't recite them for you. I've seen them and read them before.
(Exh. No. I identified.)
BY MR. BERSANI:
Q. Okay. Let me show you Deposition
Exhibit No. I with today's date. If you could take a look at that.
ADo you want me to read it?
Take a look at it.
This is, for the record, 55 Illinois Compiled Statutes, 5/3-9005, powers and duties of State's Attorney.
A Yes.
Q. Could you briefly look at that and tell me
if that's what you have reviewed before and know to be the powers and duties of State's Attorney?
A It looks like it, yeah. I have no reason to think that's anything different.
investigator pursuant to statute; is that your
understanding?
A Well, again, this is my understanding. Now,
I'm not citing anything., I'm not looking at any
documents. When that statute came into effect, my understanding was that to actually carry the gun, there was some kind of background you had to have, and I don't remember what it was. I think if you didn't have any police background at all you had to
go through this inordinate amount of schooling, just
like a 40-hour course; I can't remember.
400 hours?
A Something, it was a lot, and it was
difficult, and Phil didn't have -- he'd never been a sworn police officer. So, he had to arrange to
satisfy those criteria in order to be a special investigator. Special investigator, I'm throwing the term. I didn't know

that there was any special title of it. That was my understanding of the law.
Q. Now, if Mr. Akemann as State's Attorney had the power of appointment, you would agree with me that he also had the power of removal, correct?
A Sure.
Of investigators?
A Yes.
Q And he would also have the power of discipline of investigators if it was necessary? A Yes.
Q. And by discipline, I mean employment discipline.
A Yes.
Q. You'd agree with me that then special investigators basically served at the pleasure of the
I State's Attorney, correct?
2 A Sure.
Q And there wasn't any legal duty to employ special investigators or investigators in the State's
5 Attorney's Office at all, was there?
A No. In fact, I remember discussions about this, and I think he was of the opinion that he could have just regular investigators who wouldn't be allowed to carry a gun and couldn't arrest anybody and that kind of thing, who could perform functions, that they could still work, because I know Ramona . Piec I think still works there, I'm not certain, but
. Ache wasn't a policeman. She worked for the State Police, but she was not a policeman sworn, and he wanted her to go through that gun training thing, and she freaked out in the middle of it or something and didn't want to carry a gun, and we brought her back and gave her other duties in investigative areas, and she was not clearly a special investigator as defined by this.
Q. That's what I was going to ask you then. What about Jim Kintz, he wasn't a special investigator as designed by the statute, was he?

A I don't know that. He was an ex-cop. I don't know that.
Q. Was he authorized by the State's Attorney to carry a weapon?
A I don't know that. I don't really know that.
Q. Do you know whether he went through the 400-hour training course -
A He wouldn't have -
· Let me finish. He wouldn't have to?
A That was my understanding. If you were a retired policeman, I didn't think you had to do it.
· So, it sounds like during the tenure of
Mr. Akemann Phil Carlson and T.R. Smith were the only special investigators as you understand the statute, correct?
A To tell you the truth, I couldn't answer
that for you. I don't know what Kintz was. I don't know what the guys in the Advocacy Center were either, to tell you the truth.
o Now, what was Mr. Akemann's role in giving assignments to investigators during your tenure with them?
A He wasn't in that -- directly in that loop.
That completely -- the way I set it up in response to things which I felt were getting a little out of hand, they had to report directly to me. The way I set up the procedure was I didn't want them to do anything without prior approval, and when I say out of hand, what was starting to happen was walk down the hallway and an assistant in every door would pull them and say, hey, you know, you got to get this for me, you got to get this for me, and this wasn't enough time. So, I had set up the procedure where everybody had to come to me and get my signature on a work order, so to speak, before they did anything.
MR. BERSANI: Anything else, John?
MR. DeROSE: Go ahead.
THE WrTNESS: It never was their function to
perform like a policeman and to start an investigation, develop an entire file, and come back with recommendations

for charges. That's not what they did. When I was there, I termed it as trial support, and that involved serving subpoenas at
mss, and serving subpoenas is a very time consuming base process, and even though they didn't have that many subpoenas to serve as compared to the private subpoena service people, they were most of the time -- they were doing that or what I call trial assistance for the trial Assistant State's Attorneys, giving them pictures or finding an address or things like that. To call what they did a complete investigation, I wouldn't call it. I used to call it trial assistance.
20 BY MR. BERSANI:
Q Well, under the umbrella of trial
assistance, they would be assigned to investigate things, correct, interview witnesses, follow leads,
review records, those types of things, correct?
A They would -- I guess my only response to
that can be this because I have to answer generally
no to that because it was done at such more piecemeal of a method than that. If I needed a record, they may have to go get a record. If I wanted a statement of a defense witness who we didn't know who it was, I'd send them out and take a statement from what they
remember, but it would be very, very seldom -- I can't say never because I know it did happen at times. It was very seldom that they had like an investigation where they performed a complete investigation of a potential criminal act. It was very seldom that that happened.
Q Okay, but pursuant to your understanding of the statute, a special investigator as having these Police powers and these investigatory powers, that type of power that you just spoke of was certainly within the purview of that, correct?
A Probably is, right. I think the bigger
offices have more like a police force mentality in them.
Q Now, the statute says that to conduct

investigations which assist the State's Attorney in
2 performance of his duties. Would it be fair to say 3 or your understanding is that the State's Attorney's 4 duties are very broad, correct? 5 . A Well, as defined by the act here, it is a
big broad area to investigate and prosecute criminal acts occurring in the county; it's pretty broad.
Q The State's Attorney can exercise authority in civil matters, correct?
A Right, right.
Q And administrative matters, obviously, 12 within his office?
A Within his office, sure.
Q The State's Attorney's responsible for the 15 grand jury?
A Right.
Q State's Attorney can investigate official 18 misconduct?
A Right.
Q And that would involve county officers or 21 even officials from municipalities?
A Potentially, correct, that's true.
Q And the State's Attorney obviously could
investigate employee disciplinary matters within his office, correct?
A Sure, yes.
Q. And so, theoretically, under the statute
here with the special investigators, the special investigator could be assigned to investigate any of those matters we just discussed, correct?
A Yeah, I would agree.
Q. And you would agree that it was the State's Attorney's discretion to utilize special
investigators in any manner in which assisted in his duties, correct?
A Right. I guess the only caveat would be:
that would assist in his duties. They don't have cart blanche to do whatever they wanted, but certainly anything that

would be allowed by the statute. He'd have discretion to use them however he wanted.
Q. Now, when a special investigator is assigned to a particular activity, and let me focus on investigations, because the statute we've already agreed allows that. Let's say a special investigator is assigned to an investigation and the investigation
of the investigation back to uie State's Attorney or
the assistant, there may also be questions of the
~ investigator as to any conclusions the investigator
drew regarding their investigation, correct?
`~ A I lost you.
Q Badly asked question. Let me just ask directly. If you assigned a special investigator to go out and interview a witness and that witness may be important to a subsequent prosecution, the credibility of the witness, for example, might be an
issue, correct?
A Absolutely.
Q You would ask a special investigator, you
know, is that a credible witness, right? I mean,that's within the realm of possibility, potential, in
this process that we talked about, correct?
A In my experience, I might have asked that
is question, you know, did you believe them or did they 19 appear believable? Yeah, I guess that would be true.
Q Okay, and they have to draw a conclusion and
tell you what they think?
A That would be part of their job to tell me what they thought
Q You'd rely upon that in your prosecutorial decision, correct?
A If I asked that question and they gave me an answer, again, I would always weigh this against
S other things, too. I could rely on it at times,
yeah.

Q So, it would be accurate to say that in the course of assigning a special investigator to an investigation and that person bringing you back information, bringing you back those types of conclusions we talked about, that the investigator has significant input into your prosecutorial decision?

A Well, I'd have to disagree with that because the prosecutorial decision whether or not to Prosecute or to prosecute, the ultimate prosecutorial discretion about how these laws should be enforced or Prosecuted, that was never part of their job, and there were times when they would have recommendations for me or opinions about people which I did not accept. If I asked for an opinion, I may accept it, May rely on it, but what they said never controlled whether anybody was prosecuted or not prosecuted or any final decision.

Now, could it be that they might have some impact on -- if an investigator came to me and said, you know, I talked to this guy, he looked like a.hcroin addict, that may mean something to me. I might think about that guy's credibility. That may have played a small part in something to do with that prosecution, but to say that that was a major impact on what the decisions that the prosecuting authority had, I would have to disagree with that.

Q. But there was some input there that would possibly affect your decision?

A Their information may affect small parts of how we did our job, that's accurate.

Q. And if you assigned a special investigator to a task, inherent in that is a element of trust between you and the investigator, correct?

A Yes.

In what way?

A Well, I'd have to have some basic idea that they would tell

me the truth and that they would not abuse their position in any way, I guess. I'd have to have some confidence in that.
Q. Confidence that they're honest and integrity -
A Right, as anybody else that worked there, you have to have that feeling.
Q. How about loyalty? I don't mean political loyalty belonging to a party; I mean loyalty to the State's Attorneys and the assistants.
A I think that -- you know, there's different
degrees of that. If there was somebody who worked for the State's Attorney who clearly hated the State's Attorney and was antagonistic to anything that the State's Attorney would want to do and would immediately take the other side of any kind of question, I mean, that's not clearly the kind of person you can work with, but did they have. to agree and did they have to like people, I don't know that that's all -- I used to tell people all the time, including investigators, that I didn't care if they
liked the other employees as long as everybody worked together and was able to respect each other and work together, and that was the only caveat. There's a degree of that. I mean, someone would clearly sit there and say, I'm not going to do anything Akemann
says because I hate his guts, I mean, that guy -
obviously, you couldn't trust that person or have any credibility in what they said to you.
q. So, you would not want to put that type of person in the position of special investigator?
A I wouldn't, no.
Q. What about a person who was politically opposed to the State's Attorney? And let me define that for you, a person -- let's say that the State's Attorney's in the middle of a campaign for reelection and the special investigator supports the State's Attorney's opponent and actively supports the opponent and is publicly critical of Akemann, that's not the type of person that the State's Attorney would

want in the position of special investigator, correct?
A Again, as a general concept, I don't know
that I can disagree with that a lot, but if you look at that in a way that it would actually occur, it's hard to tell because those kinds of things could occur at particular different times. You know, if a guy walked in who wanted to be an investigator and came in there, and you know, thought Akemann was a
horse's ass from the day he was born and didn't like
him at all one bit and I hate his guts and I'd spit
on him as he walked by, yeah, I don't want that, that guy can't be, but to say that someone who may disagree with the guy -- because that happened. I mean, I ran against him. You know, I disagree with .him completely for the most part, and I could give you examples of other employees who were not
supportive of Akemann in various campaigns and who were not disciplined, and the most I'm talking about is assistants, but in my mind, an assistant is even
of a more -- is of a position which is even more sensitive than even an investigator because they speak for the State's Attorney in court, and in my experience, if we're talking about Akcrnann, because I worked for a lot of these guys. My experience was that there was no -- because you disagree with him politically, he never really had to pay off that way, not to knowledge or to my experience that that happened.
o If I'm hearing you correctly, though, if you
22 had a special investigator who was critical of the
State's Attorney in terms of the State's Attorney's
competency, honest, integrity, and publicly critical, you would not want that person in the position of special investigator, correct?
A Am I the State's Attorney when you're asking me this question?
Q. Sure.
MR. DeROSE: Objection. This doesn't give him a

full -- .
BY MR. BERSANI:
Q You understand, right?
MR. DCROSE: Excuse me. Let me make my objection, counsel. My objection is that it doesn't give the deponent a full hypothetical as to what one
might be publicly opposed to or speaking criticism about, but you may answer. Go ahead, counsel.
THE WITNESS: inherent in this is you have to be able to have a working relationship with somebody that works for you. If you're telling me that there's an employee because of his opinions would make him unable to work with me or I with him, then no, I wouldn't want that person.
BY MR. BERSANI:
Q Do you know how -- or strike that.
We talked earlier. Mr. DeRose asked
you about Phil Carlson and the fact that you were not involved directly in his hiring, correct? A Correct.
Q Do you know how he came to be hired for the position? Did he apply, in other words, or was he sought for, or any idea?
A I don't have a recollection as I sit here.
Q. Did Akemann tell me something about it at one point? He might have, but I couldn't tell you right now how I I that happened.
Q What about T.R. Smith?
A We were short somebody, and I know Dave knew T.R. as I did and other people did, and he asked my opinion and discussed his qualifications with me one time, and we discussed the possibility of that. I know how that happened. I might have interviewed T.R., too, I might have. I might have interviewed him personally.
Q T.R. Smith was hired after Meg Gorecki announced her candidacy for State's Attorney, correct?
A Oh, God, I couldn't tell you. It sounds
Q And it's a confidential nature?

A Except the other law enforcement bodies or to name people on the indictment to which you can disclose that stuff to.
Q Other than that, anyone else it's a secret proceeding, correct?
A Right.
Q So, would it be fair to say that part of their job duties was in assisting the grand jury and being agents of the grand jury was to keep matters confidential other than to those that they're authorized to speak to, correct?
A To say that was part of their job I think is overstating a little bit because their job was totally to do what I told them to do, and I never said make sure and don't tell this to the newspapers because that never was spoken that way. Now, the law is that that would be required, but I wouldn't go as far to say that was a large part of their job.
Q It's required by law, then it's part of their job duty also, correct?
A Well, I guess how I would phrase is the law would require that they don't make that public information. I don't know that I agree that that would be defined as their job duties. It's their 3 responsibility under the law.
Q There's some other entries here in which you're either listed as the attorney or someone else. Can I glean from these what the special investigator was assigned to do?
A No, probably not, because this wouldn't give you that information. The total purpose of this thing was to determine open investigations and where we were on them, what they were doing on them, not the specific job assignments.
Q And would the same go for the typewritten sheet, Exhibit No. 2?

A No. I think that has a little more information on it, because like in the status area, they put locate and serve, locate and serve. That would have been a specific assignment. Some of this other stuff on here is not quite as clear, but locate and serve clearly is. I see sometimes this says investigate. Now, I don't know what that means, but locate and serve, I do know what that means.

Q But where it says investigate, it would be your belief that that would mean that they were involved in some sort of investigatory function relative to that case, right?

A That would mean -- at least my understanding of how we define those terms at that time, that that would mean it would be something other than scrvir. paper.

Q And then that would mean if that was the case that they would bring information back to the attorney involved?

A Photograph, walk off distances with a distance wheel, find out if they're within a thousand feet of that school. That could be what it was.

Q Witness statements as a result of interviews?

A Could be.

Q Review of records or documents that are pertinent to the investigation possibly?

A When you say that, I would have to take exception to that in this instance because I would never say to an investigator or never had the assistant say, Phil, go get these documents from the bank and give me your conclusion about what they mean. That would never happen. What would happen is, Phil, get me those documents from the bank and bring them to me, or the assistant would ask that they be brought to him. We never had the investigators make decisions about the importance or the non importance about evidence.

Q You could, though? I mean certainly it's within the purview of the statute to assign that type of task to a special investigator, correct?

MR. DeROSE: Objection to the extent that that calls for a legal conclusion on this witness' part as to what the statute means, but you may answer.
THE WITNESS: in my view of what I did was I could basically ask them anything I wanted, but I didn't.
BY MR. BERSANI:
Q But you could, I mean, based on your understanding of the statute and -
A Well, no. I guess I would say no, because
my view of that would be is that that is encroaching on the state attorney's job.. That's encroaching on prosecutorial discretion, and I think that would be wrong.
your belief that that would mean that they were
involved in some sort of investigatory function relative to that case, right?
A That would mean -- at least my understanding of how we define those terms at that time, that that would mean it would be something other than scrvir. paper.
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EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Phillip D. Carlson and Thomas Smith *Plaintiffs*,	)
v.	) No. 01 C 9235
Mary E. Gorecki, individually, and as State's Attorney of Kane County, Illinois, and Kane County, Illinois, a body Politic, *Defendants.*	)

THE DEPOSITION OF DAVID AKEKANN, called by Plaintiff, for enacination, taken pursuant to the Federal Rules of Civil Procedure of the United States District courts pertaining to the taking of depositions, taken before JEAN M. HINCKS, a Notary Public and Certified Shorthand Reporter within and for the County of Cook and State of Illinois, taken at 15 Spinning Wheel Road, Hinsdale, Illinois, on the 11th day of July, A.D. 2002, at 4:40 P.M.

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PRESENT:

THE LAW OFFICES OF JOHN P. DeROSE L ASSOCIATES
BY: MR. JOHN P. DeROSE
15 Spinning Wheel Road, Suite 328
Hinsdale, IL 60521
(630) 920-1111
On behalf of the Plaintiffs;

THE LAW FIRM OF HERVAS, SOTOS, CONDON i BERSANI, P.C. BY: MR. MICHAEL D. BERSANI
333 Pierce Road, suite 195
Itasca, It, 60143
(630) 773-4774

On behalf of the Defendant,
Mary E. Gorecki, State's Attorney of Kane County;

ALSO PRESENT:

KANE COUNTY STATE'S ATTORNEY'S OFFICE:

MS. MEG GORECKI,
State's Attorney;

MS. M. KATHERINE KORAN
Assistant State's Attorney;

MR. ALLAN R. STASICA
Assistant State's Attorney;

AND

MS. SHARON LAW LARSEN
Attorney-at-Law

(Witness sworn.)
DAVID AKEMANN,
called as a witness herein by the Plaintiffs, having been first duly sworn, was examined and testified as follows:
DIRECT-EXAMINATION
BY: MR. DeROSE
Q Sir, will you please state your name for the record?
A David Akemann.
Q Spell your last name.
A A-K-E-M-A-N-N.
Q Mr. Akemann, have you ever given a 14 deposition before in your life?
A Yes.
Q I don't know if that was under the state 17 system or the federal system.

A Both.
Q Then I'll kind of short-circuit this.
This deposition will be taken according to all the applicable rules of the Federal District Court for the Northern of Illinois, the appropriate rules of the Seventh Circuit Court of Appeals, and of the United States Supreme Court that apply to the taking of depositions.
To make sure that those rules are followed, counsel from time to time may interject with an objection. If you hear counsel start to speak in any fashion, if you could please just stop talking until he and I could discuss on the record the particular question that's on the table and its efficacy under those rules that we're talking about, and we would appreciate that.
We don't want you to guess at anything.
We will not make this a trial by ordeal. If the deposition goes any extended length of time, we will take a recess. If we have not taken a recess soon enough to accommodate your needs for comfort, if for no other reasons, if you would just tell us you need a few moments, we'll be happy to interrupt and give you an opportunity to refresh yourself.
The court reporter, of course, with that machine needs verbal answers to every question, not just a nod of the head.
Mr. Akemann, are you employed at this time?
A Yes.
Q By whom are you employed?
A Jim Ryan.
Q And that's the Attorney General of the State of Illinois?
A Yeah.
Q And do you have a specific title with Mr. Ryan's office?
A Assistant Attorney General. My current

assignment is the Executive Director of the Gang Crime Prevention Center.
Q And your offices, I take it, are downtown?
A Yes, Chicago.
Q Mr. Akemann, we brought you here on a deposition concerning a period of time when you were holding an elective office of your own in Kane County. Have you held more than one elective office
A Yes.
Q How many different elective offices have you held?
A Three.
What was the first elective office you ever held?
A Precinct committeeman, Republican precinct committeeman.
Q. Where was that?
A Elgin Township, Kane County, Illinois.
Q. Do you still hold that particular position?
A No.
After holding that particular position, what was your next elected position?
A I was Kane County State's Attorney.
Q. We're going to get into that one. You say there was a third position you held as an elective office; what was that?
A A member of the Board of Governors of the Illinois Appellate Prosecutors.
Q. Do you still hold the position on the Board of Governors of the Appellate Prosecutor's Office?
A No.
Q. Now, the Kane County State's Attorney's Office that you held, what was the period of time you held it?
A December 1, 1992 through November 30, 2000.
So, I take it you were reelected to that position and held it for two terms?

A Yes.
Q And we have just completed the deposition of John Barsani, who was a member of the Kane County State's Attorney's Office. He was a member of the office during your two terms, is that correct?
A Yes.
Q Did he ever, as you remember it, actually run for election to that office at the same time you were seeking it?
A Yes, he did.
Q In which year?
A We sought the Republican nomination for that office in 1992, along with two others.
Q Do you remember the names of the two other persons who ran for that office against you and Mr. Barsanti?
A In 1992, that would have been Patrick Jaeger and John or Jack Cunningham.
Q How does Mr. Jaeger spell his name?
A My best guess would be J-A-E-G-E-R.
Q Now, after you successfully won the campaign for Kane County State's Attorney in 1992, did you fire any Assistant State's Attorneys who were already in the office from a prior administration?
A You mean -
Q Terminate their employment.
A When I came into office you mean?
Q Yes.
A No.
Q When you came into office, what position did John Barsanti hold in the office?
A Under my predecessor, Gary Johnson, I believe he was the First Assistant State's Attorney.
Q That would have put him the No. 2 man in the office?
A Yes. When I took office, he was the chief

of the Criminal Division. When I first started, I did not have a First Assistant.
Q Was that your choice not to have that position available in your office, a First Assistant?
A At that time, yes.
Q The job duties and functions that you assigned to Mr. Barsanti as your chief of the Criminal Division, did they differ at all from the job responsibilities he had had as a First Assistant under Gary Johnson, as far as you knew?
A I can't answer that. I don't know what responsibilities he had under Gary's administration.
Q If he was the chief of your Criminal Division, I would suspect you had a chief of your Civil Division also?
A Yes.
Q Who was that Assistant State's Attorney?
A That initially was Patrick Jaeger.
Q That was another Assistant State's Attorney who had campaigned against you for the 1992 position is that correct?
A Yes.
Q Did Mr. Jaeger remain on as chief of the Civil Division after you ascended office?
A He did for a period of time. I can't recall how long.
Q And then at some point, he left the office or got a different position?
A He left in a sense, but he remained a I special assistant and did work for the highway department, if I recall correctly.
Q And would that be throughout the term that you were State's Attorney of Kane County that he remained as a special Assistant State's Attorney?
A For a considerable period. It would have been for probably, as a guess, three quarters of the time, is my guess.

Q.As chief of the Criminal Division, was John Barsanti the highest-ranking Assistant State's Attorney in your Criminal Division?
A Yes.
Q. And is it fair to say that you relied upon him to direct the other Assistant State's Attorneys in the Criminal Division in your absence and with your approval?
A Yes.
o Did there come a time when you reestablished the position of First Assistant State's Attorney?
A Yes.
Do you remember when that was?
A It was after the beginning of my second ten-n. I don't recall an exact time.
o And when you reestablished the position of First Assistant State's Attorney, who did you assign to that position?
A John Barsanti.
Q. Then he would have been the No. 2 person in the office over the entire office?
A Yes.
Q. At any time while you were State's Attorney, did you ever make political allegiance a requirement of any Assistant State's Attorney who served in your office?
A Political allegiance to like a Republican party or something?
To the Republican party.
A No.
Q. Did you ever make the requirement that in order for one to be an Assistant State's Attorney in your office they had to have voted for you?
A No.
Q. I would take it when Mr. Barsanti was seeking the position of State's Attorney -- of Kane County State's Attorney in 1992 and Mr. Jaeger were seeking the position of State's Attorney in 1992, you did perceive that

those two men were not supportive of your candidacy at that time?
A No.
didn't work directly for you.. Are you talking about funding purposes?
A They were employed by other agencies.
Actually, David Moore eventually was paid by the office, but when he was- first appointed, he was a Sheriffs deputy.
Q Finally, when he was appointed to work as a special investigator in the State's Attorney's Office, you were the one who appointed him?
A Yes.
Q You are aware that Mr. Moore is a Democrat?
A Yes.
Q He's been appointed to an office in Kane County of coroner?
A Yes.
Q In order to be appointed these positions of special investigator by you, did you ever require of any of the persons you appointed to that position that they be Republicans?
A No.
Q Did you ever require of them that they vote for particular persons or candidates in any elections?
A No.
Q. Did their political affiliations and beliefs have any impact at all upon your decision to make them special investigators?
A Say that last one again, please?
Q. Did their political support or affiliation with any party or particular candidates have any bearing on your decision as to whether or not you would appoint them special investigators?
A I don't think so. In the case of the

Plaintiffs, I certainly knew them, knew of activities they did from political activities. I'm certainly aware they did them.
Q. Now, in your office as you ran it for Kane County, did your special investigators have any input into the policy-making decisions of your office?
A No.
Q. Who established policy for the Kane County State's Attorney's Office during your regime? A Ultimately, I did.
Q. Did you have any other confidants who worked closely with you in determining what policy ought to
A That would be the division heads.
Q And how many different divisions did you have in the office during your regime?
A That varied somewhat over time. Prior to tj a First Assistant position, it would have been criminal, civil, later the Child Advocacy Center, and administration.
Q So, there would have been four at the time before you had a First Assistant State's Attorney, correct?
A And juvenile also.
Q So, there would have been five then?
A Yes.
Q When you finally established the position again of First Assistant State's Attorney, did you then at that same time appoint a new chief of the Criminal Division or was the chief of the Criminal Division assumed by Mr. Barsanti in the First Assistant?
A There was a new chief of the Criminal Division. Following the shift of the First Assistant,, there would have been three division chiefs: criminal, civil and family justice.
A. Actually, you had one less division when you established the First Assistant State's Attorney's position?
A Yes.

Q. Did you require of any of the chiefs of your division that they have a particular political support or orientation in their political activities?
A You mean as to a party?
Yes.
A No. Certainly, they were supportive of me, but -
Q. Now, with respect to Phil Carlson and Thomas Smith, did you ever require of them any kind of -strike that.
The job assignments that your investigators got on a daily basis in the course of the work they did for Kane County State's Attorney's Office, who would give them those assignments?
A Under the second -- when I had a First Assistant, it would generally be the First Assistant.
o And before you had the first assistant, if the special investigators got a job assignment, who would give them to them?
A Probably myself or a division chief.
Q. So, once you put Mr. Barsanti in as First Assistant, you had him do all of the assignments for special investigators?
A yes, that was one of the reasons for the change.
Do you know -- strike that.
Were your investigators ever allowed to make any kind of policy decisions that you are aware of for your office?
A No.
Q. Was that by decision on your part that they would not be allowed to do that or was that just the policy or the procedure that was followed even before you got there, as far as you know?
A I'm not exactly certain what was there before I got there. I know that investigators during my tenure made policy for the office. Policy discussions were with chiefs' meetings, consisted of the division chiefs and myself.
Q. And you made that clear to all your division chiefs that the policy decision will be made by us and only us?

A Well, eventually by me, yeah.
Q. So, any policy that came out from the office, it had your imprimatur on it? It was something that you had ultimate -
A I think the major ones. Each division had,
I'm sure, things they did and supervised in their divisions. I can't say that I saw everything. It
would have been a division chief that' would have made those kinds of things.
Q. The kinds of job responsibilities that your special investigators received from the various division chiefs and then finally from the First Assistant, were any of those job responsibilities, to your knowledge, ever dependent upon the political affiliation of those special investigators?
A Could you repeat that, sir?
Q. The job responsibilities and assignments
that the division chiefs and the First Assistants gave to the special investigators, were any of those job assignments dependent upon what political party any of the investigators happened to be members of?
A No.
Q Did you ever receive any complaints that
Mr. Moore, who was a Democrat, failed to do a
particular job because of his political affiliation in the community?
A None that I recall.
Q Were you ever advised that Mr. Carlson or Mr. Smith refused any job responsibility or assignment that they were given because of their political beliefs or affiliations?
A Did they refuse a job assignment because of their political affiliations? I don't know that either of them ever refused a job assignment.
Q. And if they had so -- if their political
beliefs had interfered with the job responsibilities that were

being assigned to them by the hierarchy of your staff, you would have wanted to know that, is that correct?
A Sure.
Q. Has political affiliation ever entered into any decisions you made while you were State's Attorney of Kane County in determining either the suitability for employment of a particular individual or for retention of employment of a particular individual?
Mr. Moore, who was a Democrat, failed to do a particular job because of his political affiliation in the community?
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A Sure.
Q. Has political affiliation ever entered into any decisions you made while you were State's Attorney of Kane County in determining either the suitability for employment of a particular individual or for retention of employment of a particular individual?
A I don't believe so. Obviously, as I said before, I've known one or more employees because of my past experience that have been involved and certainly was aware of it. Was that controlling? No.
Q. You are aware that Mr. Carlson and Mr. Smith supported your candidacy for office of State's Attorney, is that correct?
A Yes.
Q. If they had not supported your candidacy,

were you prepared to terminate their employment?
A I don't know. I never really -
Did you allow -
MR. BERSANI: Wait.
question?
THE WITNESS: I don't know that I ever contemplated that. Was I prepared to -- you mean did I ever tell them, If you don't do this, I'll fire you? No, I never had that discussion.
BY MR. DeROSE:
Q. Did you ever discipline or terminate any employee of the Kane County State's Attorney's Office for failure to support your candidacy?
while they were employees of your office
your own personal observations and getting
back from the division chiefs and First
Assistant, did you perceive that Mr. Carlson and
Mr. Smith were performing the job functions expected
of them as special investigators to the Kane County
tale's Attorney's Office?
A. yes, That would absent the time of Mr. Carlson's illness.
Q There was a period of time when he was ill?
A He had a stroke.
Q And that because of the illness, that was an
excused absence.
A Yes.
Q You are aware that both Mr. Carlson and
Mr. Smith were involved in political activities from
time to time while being members of your staff, is
that correct?
A Yes.
Q Was there any policy that you had in your
office about not doing political work during normal
business hours?
A Yes.
Q What was that policy, as best you remember
it?

A It was doing campaign work while you're on office time was prohibited.
Q And to your knowledge, did Mr. Carlson or Mr. Smith ever violate that policy?
A Not to my knowledge.
Q And if they had, you would not have approved of it and would have corrected it, is that correct?
A That's correct.
Q If Mr. Carlson or Mr. Smith disagreed with some activity done by other members of your staff, you would not discipline them for that for merely having that disagreement provided they did the work that was expected of them?
A Yes.
Q Did you bear from time to time that Mr. Carlson and Mr. Smith found fault with the activities that they believed had been done by your campaign adversary, Miss Gorecki?
A Say that one again, please?
Q Did you learn in the course of your discussions with either of them that either Mr. Smith or Mr. Carlson had found fault with some activities of Miss Gorecki which they believed or had learned had occurred during the time that she was your campaign adversary?
A Yes.
Q And did you prohibit them from voicing any personal opinions they might have had about Miss Gorecki's activities that they found to be objectionable?
A I don't recall doing that, no.
Q Are there many employees of the Kane County State's Attorney's Office who are active in politics in the community, in the Kane County community, as far as you perceive it?
A I wouldn't have any idea at the present time.
Q When you were there, were there many persons who were in the employ of the Kane County

State's Attorney's Office who you did perceive were active in politics?
A There were some, yeah, that were.
Q And some persons were more active than others, in your opinion?A Obviously, yes.
Q Did the activities of those persons no matter which party and candidates they happened to support in any way impact your decision to keep those persons in the employ of Kane County State's Attorney?
A No.
Q And the only policy was if you're going to be involved in politics you must do it on your own time and off from business hours?
A It was written -- I don't know what the exact words, but the essence was you do it on your own time and your own place.
Q There was a written policy also?
A Yes.
Q Was it a written policy that had been put in place by you or was it on the books even before you got there?
A I know it was by me. I don't know what exactly it was before I got there.
Q Can you describe your own opinion the loyalty of Mr. Carlson to doing the jobs that are
.....
document obtained and produced to counsel. This is a document from the State's Attorney Office from the personnel files of the Plaintiffs, which set forth the duties of special investigators. Do you 1Agnize this document?
A Not specifically. I recall something like this Whether it's this or not, I don't know.
Q Do you have any reason to dispute that sets forth accurately the duties of special investigators

while you were State's Attorney?
A It appears to follow the statutory language as I recall it.
Q Okay, and that was going to be my next question, that it for all intents and purposes is identical to the statutory language, correct?
A It appears to be, yeah.
Q Now, as State's Attorney, you hae the authority to appoint special investigators. You also have the authority to assign directly and personally special investigators to any particular task or activity, correct?
A Yes.
Q Including to conduct investigations which would assist you as State's Attorney in the performance of your duties, correct?
A Yes.
Q That's a power that you don't have to delegate to an assistant if you don't want to, correct?
A I think you need to clarify it or at least please clarify that.
Q I'll withdraw that question.
As State's Attorney, you have the power to, for example, require that a special investigator report back to you directly about his activities or the fruits of any investigation, correct?
A Sure.
Q And you'd agree with me that the statute and the job description empower you as State's Attorney to assign a special investigator to conduct investigations into any matter which is in your power to investigate, correct?
A Yes.
Q And that would include any civil matter, criminal matter, administrative matter, correct? A Yes.
Q. That would include assignments to the grand jury, if necessary, correct?

A Only with the consent of the grand jury. There's a process for that.
Q. They'd have to become an agent of the grand jury?
A That's a statutory process, too. There's a motion, and it has to be a motion by certain number of the grand jurors and the foreperson and present it to the court, and the court would appoint investigators for the grand jury based on that motion.
Q. Is it your testimony that you cannot as State's Attorney unilaterally appoint a special investigator to assist a grand jury in whatever function they need assistance with?
A That's right.
Q. Okay. I asked that because Mr. Barsanti testified to something differently earlier.
A That's my understanding based on case law.
Q. Mr. Barsanti during your tenure was the person who was basically supervising all grand juries, correct?
A No. That would have been lower. It would have been while he was head of criminal. I believe he assigned that to someone else or the chief of criminal did when he became First Assistant.
Q. Pursuant to the statute, a job description of State's Attorney could appoint a special investigator to investigate official misconduct, correct?
A If it's a state alleged offense, yes.
Q You could appoint somebody to investigate official misconduct by whether it's a county officer or employee or someone from a municipality or local government within your county, correct?
A Yes. I'm assuming by official misconduct 15 you mean the statutory definition as opposed to 16 something federal.
Q Obviously something related to their 18 official duties?
A Yes.
Q And so, if you assigned a special investigator as State's Attorney to investigate some matter that's within your power to investigate, you would expect

that investigator to come back to you
and describe for you or give you information as to
whatt they investigated, correct?
A Unless I told them to give it to somebody
yes.
Q And so, as a result of an investigation that
was assigned to a special investigator, decisions are
made by either yourself as State's Attorney, if you so choose,
or one of your assistants, correct?
MR. DeROSE: well, objection. That assumes a lot of -- a hypothetical doesn't cover all the possibilities. Just because a man tells him something doesn't necessarily -
MR. BERSANI: I'll rephrase the question. BY MR. BERSANI:
Q. As a State's Attorney, if an investigation required that the investigator come back to you and report back to you directly, you would rely upon what that person has to say to you either negatively or positively, however you want to rely upon it, in making decisions, correct?
MR. DeROSE: Objection. We don't know what the report would be the person would say. When you say rely upon it negatively, you mean you wouldn't rely
on it? Objection to the form of the question. BY MR. BERSANI:
Q Do you understand the question? A Yes, I do.
Q. How would you answer it? A Are you done?
Yeah, we're done.
A I'd certainly give it weight and whatever -it depends on a lot of things, the nature of the topic, the nature of the work that was done. It certainly would be given consideration.
Q. And decisions are made, and those decisions run the gamut of whether to charge somebody with a crime, whether to bring a case before a grand jury, whether to investigate further. I mean, there's a
gamut of decisions that are made as a result of investigations by special investigators, correct?

A Yes.
Q. And so, in effect, special investigators
have input into those decisions by virtue of their investigation and the information they bring back, correct?
A If input means a factual report, they have
input. If input means suggestions as to dispositions
2 or further activity in terms of prosecutions, no.
Q You mean you would not expect a special 4 investigator to give you a recommendation as to whether to make a certain decision -
A No.
Q -- as a result of an investigation?
A No.
Q Have you ever asked for that type of
to recommendation or conclusion or opinion by investigators?
A Not that I recall, no.
Q An investigation done by a special
14 investigator pursuant to the statute in the job
15 description assigned by you as State's Attorney would be considered confidential by you, correct?
A Well, liken to any investigation, yeah, any 18 police investigation would be that way properly, I 19 would think.
Q And any discussions that a special
investigator would have with you as State's Attorney as a result of their investigation would be done in 23 confidence and in private, correct?
A There may be others involved in the
discussions, depending on who was all involved in the 3 process.
Q And who was involved in the decision, right?
A Yes.
Q Obviously, the general public wouldn't be 7 invited to that meeting, correct?
A No.
Q So, the confidentiality of an investigation

done by a special investigator would not only be a requirement but also would be a necessity because you don't want that investigation jeopardized or the integrity of it jeopardized or any subsequent prosecution that may come out of it, correct? I S
A Can you repeat that, sir?
Q I don't think I could.
Could you repeat that question?
(Question read.)
THE WITNESS: i believe that's correct, the same 2o as any police investigation.
BY MR. BERSANI:
Q So, the process of appointing a special investigator to conduct an investigation into some
.....
Just a few questions. Were there any
ons in which county vehicles were used -
strikee that.
Were there any occasions where county
cles were observed at your campaign office?
Yes.
Q And whose vehicles?
It would depend. People would stop there
if they're looking for me or looking for somebody or
mething.
Mr. Akemann, during your tenure as State's Attorney, did you demand political allegiance to you as a requirement for the job of special investigator?
A I don't think so, no.
Q How about personal allegiance? A No, not really.
MR. BERSANI: I don't have anything else. MR. DeROSE: Just a little bit.
REDIRECT-EXAMINATION BY: MR. DeROSE
Q You told counsel that Phil Carlson was not hired as a peace officer; he was hired as an vestigator. There's a distinction in your mind.

What did you mean by that?
A There have been investigators in the
tate's Attorney's Office, at least people who were
led that, had that title since I first started
working there late '70s.
Q Did you expect some of your investigators to more involved in police officer type.work, that is
armed law enforcement work, as opposed to
investigative functions?
A Eventually, it came to that. You know, it
didn't start out that way.
Q At some point during his employment with
ur office, you did require Mr. Carlson to undergo
Ate training program to be allowed to carry a firearm
With the office?
A To be a peace officer, um-hmm.
ti Q And he met those requirements as required by
statute?
A Yes.
Q You made a statement to counsel that you
d eliminate a person from a position in your
Ice as long as it was not done for an unlawful
. Do you remember making that statement?
MR. BERSANI: Object. I think that mischaracterizes his testimony. BY MR. DCROSE:
o Do you remember that kind of an answer where you said it's not done for an unlawful purpose?
A I believe I do, yeah.
Q. What did you have in mind when you said that you could eliminate a person from your office as long as it's not done for unlawful purpose?
MR. BERSANI: I'll object based on not relevant in terms of what this witness' opinion is in that regard.
Go ahead and answer.
TIIE WITNESS: My understanding of the law then and now is you can't terminate a person for an unlawful purpose.

BY MR. DCROSE:
Q. How about a person who is speaking out on a matter of public concern about violations of the law, can you terminate a person for that?
A It was my general understanding then and now, and it really came out of a case that I was involved in when I was in the Civil Division that went up to the Seventh Circuit, the Fakrodan case, but generally speaking, you can't terminate someone's employment for exercising their First Amendment freedom as a general proposition, case law, et cetera, for racial or whatever.
Q. In giving some of the other answers to counsel, you indicated that an investigator, a special investigator in your office, has input into your decisions to the extent that he or she gives you a factual report, but you also indicated that an investigator does not have input into the decision as to whether or not to prosecute. Do you remember that line of questioning?
A Yes.
Q. Can you tell us why it is that you don't allow the special investigators to have input into the decision of whether or not to prosecute?
A Well, it's not their function. The prosecutorial decisions are to be made by assistants.
Q. Assistant State's Attorney and the State's Attorney?
A Yes.
You've told counsel that the confidentiality of an investigation must be protected, and you expected it to be protected by all the persons who were working in your office, is that correct?
A Yes.
Q. Did you ever observe Mr. Smith not to be observing the confidentiality of the investigations going on in your office?
A No.
Q. Did you ever observe Mr. Carlson to fail to observe the confidentiality of the investigations that were being

conducted in your office?
A No.
Q. You indicated for counsel that you expected the investigators to have integrity, is that correct? A Yes.
Q. Did Mr. Smith at any time in your experience while you were State's Attorney fail to have the kind of integrity that you expected of him in that office? A No.
Q. Did Mr. Carlson ever fail to show the kind of integrity that you expected of an investigator in your office?
A No.
Q You said that you wanted people out - excuse me. You wanted people who are there to do their job. Do you remember making that kind of an expression?
A Yes.
Q Did Mr. Carlson impress you as a person who was there to do the job you expected.of him as an investigator of the State's Attorney's Office?
A Yes.
Q Did Mr. Smith impress you as the kind of person who was there to do his job?
A Yes.
Q Now, counsel asked you if you would fail to hire or if you would terminate a person if you had reason to challenge their integrity, and I think you indicated you would, is that correct?
A Yes.
Q If an employee is -- and you indicated if an employee was speaking out on behalf of your opponent, you would find that to be a problem for you to retain or her, correct?
A I said you would certainly not want to have le that are -
Q. Being supportive of your opponent?
A Yes.
Q. If you had an employee who was supporting your

opponent and speaking out because you, as the opponent, had broken the law, would you believe that you would have the right to discipline that employee, anyway?
A As I think I indicated before, my understanding from my experience was you couldn't impose discipline for a person in exercising their First Amendment Right. I've read Rutan, as we all have, and there's exceptions to that.
Q. Mr. Akemann, do you believe as State's Attorney you would have the authority to require an employee to remain silent if the employee has learned of a breach of the laws of the State of Illinois?
A I wouldn't have -
MR. BERSANI: Objection, relevance.
BY MR. DCROSE:
Q. You may answer.
A I don't think I'd have that right. I did not feel as the State's Attorney I had that right. MR. DcROSE: I have no further questions.
RECROSS-EXAMINATION BY: MR. BERSANI
Q. You indicated there are exceptions to the prohibition on firing somebody for political reasons, right?
A Sure.
Q. That generally involves employees who occupy positions for which political loyalty affiliation are an appropriate job requirement, correct?
A Well, from Elrod through Rutan and its progeny.
Q. Looking at the statute, Exhibit No. I, and the job description, which is Exhibit No. 8, there's nothing in either of those two documents that prohibit or preclude a special investigator from having input into a decision made by either you as State's Attorney or one of your assistants, correct?
A Your question was, is there anything in there that prohibits them or precludes them from having input into a decision the State's Attorney or an assistant made?
Q. Right.
A Not to my knowledge.

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Phillip D. Carlson and Thomas Smith *Plaintiffs,*	)	No. 01 C 9235
v.	)	**Charles R. Norgle, Sr.,** Judge Presiding.
Mary E. Gorecki, *Defendant.*	)	JURY REMANDED

AFFIDAVIT OF PHILLIP D. CARLSON

I, PHILLIP D. CARLSON, having first been duly sworn, on oath, depose and state as follows:

1. I am one of the Plaintiffs in the above-captioned cause.

2. I was an investigator for the Kane County State's Attorney's Office from May of 1996 until December 1, 2000 when I was fired by Defendant Mary E. Gorecki.

3. Prior to my hiring as an investigator for the Kane County State's Attorney's Office, I had over twelve (12) years experience in investigative work for the Illinois Secretary of State's Office.

4. As part of my training for investigative work with the Kane County State's Attorney's Office, I attended and successfully completed the Northeast Multi-Regional Police Training Institute Program, a 400 hour training regimen.

5. My salary as an investigator was paid out of the budget of the Kane County State's Attorney's Office and from federal grant money.

6. While employed as an investigator in the Kane County State's Attorneys Office, I was expected to do and did the ministerial tasks as assigned to me by the Assistant State's Attorneys of the office.

7. My assignments included locating witnesses, serving subpoenas, transporting witnesses to court, and interviewing witnesses for trial under the direction of the Assistant State's Attorneys who gave me my assignments.

8. On a rare occasion when an investigation conducted by one of the law enforcement agencies which brought a case to the attention of our office was found by an Assistant State's Attorney to be deficient or wanting in some particular, I would be assigned to do or complete the investigation that was needed for trial or post trial sentencing.

9. On those occasions where the investigator was called upon to investigate a pending or potential case, their responsibilities were to augment the police department's primary investigation by securing documents by a subpoena prepared by others, getting physical control of the documents, and delivering them to the Assistant State's Attorney who requested them.

10. The investigations done and tasks accomplished by me for the Kane County State's Attorney's Office were always supervised by the Assistant State's Attorney who requested the particular investigation or task.

11. Although he was my friend and I would see him socially, I had only minimal professional contact with the State's

Attorney of Kane County while I worked as an investigator in his office.

12. At no time was I ever present in or consulted during any policy making conferences in the Kane County State's Attorney's Office.

13. I did not participate in any way in the policy making decisions of the Kane County State's Attorney's Office.

14. Before I was hired and during my employment with the Kane County State's Attorney's Office, there was no "litmus test" of political affiliation necessary to be an investigator for the office.

15. Political affiliation was unimportant to and unnecessary for the tasks assigned to me as an investigator in the Kane County State's Attorney's Office.

16. While I worked as an investigator for the Kane County State's Attorney's Office, my personal integrity and my professional reputation were never questioned at any time.

17. I always strived to do best job I could as an investigator for the Kane County State's Attorney's Office and sought to be of assistance to the prosecutors and staff of the office, and I would have continued to do so for Defendant Mary E. Gorecki if she had not terminated my employment.

18. If called upon to do so, I am competent to testify concerning the matters asserted in this Affidavit.

19. Further Affiant saith not.

/s/ Phillip D. Carlson

John P. DeRose and Associates
15 Spinning Wheel Road Suite 328
Hinsdale, Illinois 60521
(630) 920-1111

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Phillip D. Carlson and Thomas Smith *Plaintiffs,*	)	No. 01 C 9235
v.	)	**Charles R. Norgle, Sr.,** Judge Presiding.
Mary E. Gorecki, *Defendant.*	)	JURY REMANDED

AFFIDAVIT OF THOMAS R. SMITH

I, THOMAS R. SMITH, having first been duly sworn, on oath, depose and state as follows:

1. I am one of the Plaintiffs in the above-captioned cause.

2. I was an investigator for the Kane County State's Attorney's Office for over two (2) years until I was fired by Defendant Mary E. Gorecki on December 1, 2000.

3. Prior to my hiring as an investigator for the Kane County State's Attorney's Office, I had over thirty (30) years experience in investigative and law enforcement work for the Cook County Sheriff's Police Department.

4. As part of my training for investigative work with the Kane County State's Attorney's Office, I attended and successfully completed the Northeast Multi-Regional Police Training Institute Program, a 400 hour training regimen.

5. While employed as an investigator in the Kane County State's Attorneys Office, I was expected to do and did the ministerial tasks as assigned to me by the Assistant State's Attorneys of the office.

6. My assignments included locating witnesses, serving subpoenas,'transporting witnesses to court, and+ interviewing witnesses for trial under the direction of the Assistant State's Attorneys who gave me my assignments.

7. On a rare occasion when an investigation conducted by one of the law enforcement agencies which brought a case to the attention of our office was found by an Assistant State's Attorney to be deficient or wanting in some particular, I would be assigned to do or complete theinvestigation that was needed for trial or post trial sentencing.

8. On those occasions where the investigator was called upon to investigate a pending or potential case, our responsibilities as investigators were to augment the police department's primary investigation responsibilities by securing documents through a subpoena prepared by others, getting physical control of the documents, and delivering them to the Assistant State's Attorney who requested them.

9. The investigations done and tasks accomplished by me for the Kane County State's Attorney's Office were always supervised by the Assistant State's Attorney who requested the particular investigation or task.

10. I had only minimal contact with the State's Attorney of Kane County while I worked as an investigator in his office.

11. At no time was I ever present in or consulted during any policy making conferences in the Kane County State's Attorney's Office.

12. I did not participate in any way in the policy making decisions of the Kane County State's Attorney's Office.

13. Before I was hired and during my employment with the Kane County State's Attorney's Office, there was no "litmus test" of political affiliation necessary to be an investigator far the office.

14. Political affiliation was unimportant to and unnecessary for the tasks assigned to me as an investigator in the Kane County State's Attorney's Office.

15. While I worked as an investigator for the Kane County State's Attorney's Office, my personal integrity and my professional reputation were never questioned at any time.

16. 1 always strived to do the best job I could as an investigator for the Kane County State's Attorney's Office and sought to be of assistance to the prosecutors and staffof the office, and I would have continued to do so for Defendant Mary E. Gorecki if she had not terminated my employment.

17. If called upon to do so, I am competent to testify concerning the matters asserted in this Affidavit.
18. Further Afflant saith not.

/s/ Thomas R. Smith
Subscribed d sworn to before me

John P. DeRose and Associates
15 Spinning Wheel Road Suite 328
Hinsdale, Illinois 60521
(630) 920-1111

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Phillip D. Carlson and Thomas Smith *Plaintiffs,*	)	No. 01 C 9235
v.	)	**Charles R. Norgle, Sr.,** Judge Presiding.
Mary E. Gorecki, *Defendant.*	)	JURY REMANDED

AFFIDAVIT OF DAVID W. MOORE

I, DAVID W. MOORE, having first been duly sworn, on oath, depose and state as follows:

1. I was a Special Investigator for the Kane County State's Attorney's Office from January 1994 until April, 1998.

2. When I first started as an investigator for the Kane County State's Attorney's Office, I was its only criminal investigator in an office of approximately sixty Assistant State's Attorneys.

3. In May of 1998 I left the office when I became the Coroner of Kane County, having been appointed to that position by the Kane County Board where I remained until November 2001.

4. Prior to my hiring as an investigator for the Kane County State's Attorney's Office, I had over twenty-eight (28) years

experience in investigative work for the Kane County Sheriff's Police.

5. For the Kane County Sheriff's Police, I had been involved in Sheriffs Patrol and Criminal Investigations.

6. At the end of my career for the Kane County Sheriff's Police, I was the Supervisor of Transportation.

7. I received all my training in and for investigative work prior to my accepting a position as a Kane County State's Attorney's Special Investigator.

8. When Phillip Carlson was hired by Kane County State's Attorney David Akemann, I was given the responsibility of making sure that Carlson was enrolled in and received all training and certification that was required by the Illinois Law Enforcement Standards Board.

9. Phillip Carlson received all such required training and certification.

10. While employed as an investigator in the Kane County State's Attorneys Office, I was expected to do and did the ministerial tasks as assigned to me by the Assistant State's Attorneys of the office.

11. Assistant State's Attorneys assigned me to locate witnesses, serve subpoenas, transport witnesses to court, and interview witnesses for trials they were preparing or presenting.

12. I was the lead investigator for the Kane County State's Attorney's Office all the while I was there.

13. When an Assistant State's Attorney needed any follow-up investigation to a case he was working on, he

would request assistance from John Bersanti, the First Assistant State's Attorney.

14. Mr. Bersanti would then review and approve the request and would assign a particular investigator to fulfill that request.

15. As Lead Investigator, I would log-in and keep a paper record of all investigative assignments.

16. On those occasions where the investigator was called upon to investigate a pending or potential case, their responsibilities were to augment the police department's primary investigation by securing documents by a subpoena prepared by others, getting physical control of the documents, and delivering them to the Assistant State's Attorney who requested them.

17. The investigations done and tasks accomplished by me for the Kane County State's Attorney's Office were always supervised by the Assistant State's Attorney who requested the particular investigation or task.

18. If the Assistant State's Attorney was not satisfied, additional work had to be done before the assignment was deemed to be completed and approved.

19. I had only minimal professional contact with the State's Attorney of Kane County while I worked as an investigator in his office.

20. I did not participate in any way in the policy making decisions of the Kane County State's Attorney's Office.

21. At no time was I ever present in or consulted during any policy making conferences in the Kane County State's Attorney's Office, with one exception.

22. On only one occasion, I was brought into a meeting with the State's Attorney and the First Assistant State's Attorney and advised that a chain of command was going to be established for the office on how cases were to be assigned.
23. Because of my thirty-five (35) years with the United States Army and my almost twenty-nine (29) years with the Kane County Sheriff's Office, the State's Attorney and First Assistant asked my advice and input into establishing a chain of command so that they could avoid Assistant State's Attorneys merely delegating assignments directly to the investigators.

24. Following our discussions, the State's Attorney and First Assistant State's Attorney established a chain of command.

25. Thereafter, any assignment given an investigator would come from Mr. Bersanti in writing.

26. I would get a copy of the written assignment and would log it in.

27. Through this log system, I would keep track of all investigations that were being conducted by the investigators for the Kane County State's Attorney's Office.

28. I would make a copy of my log book weekly and provide the copy to the State's Attorney and the First Assistant State's Attorney and advise them of the progress of the assignments they had given the investigators.

29. At no time during my employment with the Kane County State's Attorney's Office was there a "litmus test" of political affiliation necessary to be an investigator for the office.

30. 1 have ways been a registered Democrat in Kane County, a predominantly Republican County.
31. Political affiliation was unimportant to and unnecessary for the tasks assigned to me as an investigator in the Kane County State's Attorney's Office.

32. At no time was my personal integrity and/or my professional reputation ever questioned while I worked as an investigator for the Kane County State's Attorney's Office.

33. As a matter of fact, I received an award from the Illinois State Bar Association for Outstanding Law Enforcement to the Kane County State's Attorney's Office in May of 1999.
34. I had previously over my career in law enforcement received numerous other
awards and accolades for the work and services I performed.
35. If called upon to do so, I am competent to testify concerning the matters asserted in this Affidavit.

33. Further Affiant saith not.

Subscribed and sworn to before me this 16th day of April, 2002.

John P. DeRose and Associates
15 Spinning Wheel Road Suite 328
Hinsdale, Illinois 60521
(630) 920-1111

EXHIBIT 6

BEFORE THE HEARING BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

IN RE THE MATTER OF:	)	
	)	
MARY ELIZABETH GORECKI,	)	Commission No. 01 CH 9
Attorney No. 6208279,	)	
	)	
Attorney-Respondent.	)	

REPORT OF PROCEEDINGS had in the above-entitled matter before the Hearing Board of the Attorney Registration and Disciplinary Commission, at Suite 1100, One Prudential Plaza, Chicago, Illinois, on November 30, 2001, commencing at 9:30 a.m.

When you say "alleged conversations," did you intend to create some doubt'in Mr. Karmgard's mind as to whether these messages had ever been left?
A. No.
Q. Nowhere in this letter do you admit to having left these answering machine messages, do you?
A. I don't know if I did in that letter or not.
Q. Now, at some point were you interviewed, in fact, May 22 of 2000 by an FBI agent?
A. I'm not sure of the date, but I was interviewed by an FBI agent.
Q. What's that person's name?
A. Sam Dorger.
Q. Where did the interview occur? A. In Chicago.
Q. Specifically where?

A. At Mayer, Brown & Platt.
Q. Did you have a conversation with Agent Dorger about the tapes?
A. Yes.
Q. Did he ask you who the primary source was that you referred to?
A. Yes.
Q. Did you tell him that the primary source may have been a person named Phil Carlson?
A. No. I think I told Mr'. Dorger that I didn't speak to anyone, and then he asked me who could you have ever had a conversation like this about or with. And I don't know if he asked me whether Jane's mother had ever spoken to someone, and I may have said Phil Carlson, but that was in general terms. I think he asked me who I was referring to, who I could have been referring to, that's when his name came up, but not that I ever spoke to him.
Q. So you didn't link the name of Phil Carlson to the reference on the tape to a primary source?
A. Yeah, I think that that's exactly what I said, that he would have been the type of person who would have been a primary source, but not that I had ever spoken to him at any point.interview with Agent Dorger?
A. He ran for Kane County clerk, and he lost, and then he was hired by David Akemann as a special investigator for the State's Attorney's Office.
Q. Who is Phil Carlson?
A. He's the man sitting in the blue shirt in the second row.
Q. How did you know him as of the time of your interview with Agent Dorger?
A. He ran for the Kane County Clerk, and he lost, and then he was hired by David Akemann as a special investigator for the State's Attorney;s Office.
Q. You deny that the reference to Mr. Carlson was in connection with Agent Dorger's question about primary

source?
A. No. When I was having a conversation, I mean, I indicated to the FBI agent that if there is reference to a primary source, it would have been a person like Phil Carlson, but that I had not spoken to him.
Q.Did you say it was a person like Phil Carlson
or it was Phil Carlson?
A. I don't recall the exact words, if it was a person like him, if it was him. I could have said it would be a person -- it could be someone like Phil Carlson, or someone like Phil Carlson or Phil Carlson.
referred to on the tape?
A. No. I never spoke to anyone.
Q. Around the time of your meeting with Agent Dorger did you announce your own investigation into this set of allegations?
A. Before. That's why I hired Attorney Fahner because no one contacted me after the primary, and weeks and weeks went by and I had to do something. I had to call someone. I had to do something. So I hired Attorney Tyrone Fahner.

EXHIBIT 7

T.R. Smith
Burlington Township Committeeman
P.O. Box 342
Burlington, IL 60109

November 3, 2000

Dear Friends and Neighbors:

I am your elected Republican Committeeman. I have been a die-hard Republican voter for over 35 years. I have been your Republican Committeeman for over 10 years and was the former Republican Chairman for the Western Township of Kane County, It is truly an honor to represent and serve you in local government. I take my responsibility extremely seriously.

Normally, the Republican Party and the Primary Voters do an excellent job in choosing the most qualified and experienced candidate for Federal. State, and local offices. They usually do an excellent job sorting out qualified candidates and reviewing qualifications. During this Important election, it is my opinion (after 35 years) that they have not.

I am, for the first time in my Republican history, supporting the Democratic State's Attorney Challenger, Robert J. Steffen. I do so because he is honest and good. it is important for you to understand why I am supporting a Democratic opponent.

In the Primary, I was very concerned about M, 'Meg' Gorecki's lack of experience, youthful naivety, and inability to lead. Now, after serious ethical revelations during the last several months, 1 am even more concerned about her ethic. Integrity, and lack of honesty.

After much, much soul-searching and consternation, it's with a very heavy heart, that I am not recommending a Republican candidate to you. The Chief Law Enforcement Officer of Kane County must be beyond reproach. Gorecki is not.

I am however encouraging all of you to remain stead-fast in your support of Bush/Cheney Republican Presidential ticket.

Thanks for your time and attention. Remember to get out and vote on November 7, 2000.

Sincerely,

_____

/s/ T.R. Smith. Republican Committeeman

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Phillip D. Carlson and Thomas Smith *Plaintiffs,*	)	No. 01 C 9235
v.	)	**Charles R. Norgle, Sr.,** Judge Presiding.
Mary E. Gorecki, *Defendant.*	)	

DEFENDANT'S RESPONSE TO PLAINTIFFS' STATEMENT OF ADDITIONAL MATERIAL FACTS

1. Defendant admits the facts contained in paragraph 1 for purposes of the motion for summary judgment only.

2. Defendant admits the facts contained in paragraph 2 for purposes of the motion for summary judgment only.

3. Defendant admits the facts contained in paragraph 3 for purposes of the motion for summary judgment only.

4. Defendant admits the facts contained in paragraph 4 for purposes of the motion for summary judgment only.

5. Paragraph 6 mischaracterizes Barsanti's complete deposition testimony. Barsanti also testified as to his familiarity with the statutory duties of a Special Investigator and concluded that he would not want a person in the position of Special Investigator who was antagonistic toward the State's Attorney, or who politically supported the

State's Attorney's opponent and publicly criticized the State's Attorney (Barsanti Dep., pp. 52-53, 76-79, attached hereto as Exhibit A). Furthermore, Akemann also testified that he would not keep a person in the position of Special Investigator who publicly supported his political opponent, publicly campaigned for his opponent, and publicly criticized his own competency, honesty and integrity as the elected State's Attorney (Akemann Dep., pp. 60-61, attached hereto as Exhibit B).

6. Paragraph 6 mischaracterizes Barsanti's complete deposition testimony. Barsanti testified that early on in his career with the State's Attorney's Office, when he was just an assistant, investigators served subpoenas, and occasionally he would have them take a photograph (Ex. A, pp. 23-24). However, Barsanti testified that when the statute was amended the duties of the office of Special Investigator were broadened to include the authority to conduct investigations and to exercise police powers (Ex. A, pp. 52-56). In addition, Barsanti testified that, in fact, Special Investigators under Akemann were assigned to do more than just locate witnesses or serve subpoenas (Ex. A, pp. 82-86, 91, 93; Investigator's Log, attached hereto as Ex. C). In fact, Plaintiff Carlson conducted an investigation at Barsanti's direction into an allegation of official misconduct concerning the county's coroner's office, and he made a report and recommendation which Barsanti relied upon in deciding not to bring charges (Ex. A, pp. 9395).

7. See response to paragraph 6 above.

8. See response to paragraph 6 above. In addition, Barsanti testified that there were times that Special Investigators attended policy-making meetings with the State's Attorney and gave reports and input (Ex. A, p. 46).

9. Defendant admits the facts contained in paragraph 9 for purposes of the motion for summary judgment only. See response to paragraph 5 above.

10. Defendant admits the facts contained in paragraph 10 for purposes of the motion for summary judgment only.

11. Defendant admits the facts contained in paragraph 11 for purposes of the motion for summary judgment only.

12. Paragraph 12 mischaracterizes Barsanti's complete deposition testimony. Special Investigators conducted investigations which assisted the State's Attorney in the performance of his duties and attended policy-making meetings and otherwise had meaningful input into prosecutorial decisions. Barsanti testified that the State's Attorney or his assistant would rely on information provided by a Special Investigator in making prosecutorial decisions (Ex. A, pp. 6975, 93-95). He admitted that there were times when Special Investigators would have recommendations or opinions, which he may or may not accept (Ex. A, pp. 74, 93-95). See responses to paragraphs 6 and 8 above.

13. Paragraph 13 mischaracterizes Barsanti's complete deposition testimony. See responses to paragraphs 6, 8 and 12 above.

14. Paragraph 14 mischaracterizes Barsanti's complete deposition testimony. See response to paragraph 5 above.

15. Defendant admits the facts contained in paragraph 15 for purposes of the motion for summary judgment only.

16. Defendant admits the facts contained in paragraph 16 for purposes of the motion for summary judgment only.

17. Paragraph 17 mischaracterizes Barsanti's complete deposition testimony. Barsanti testified that, at Akemann's direction, he developed a system of keeping track of all investigative and non-investigative activities assigned to Special Investigators (Ex. A, pp. 82-84; Ex. C, Invest. Log). This report, entitled "Investigators Log," was given to Barsanti and Akemann at the end of each week, and Barsanti and Akemann would meet to discuss specific investigations (Ex. A, p. 84; Ex. C, Invest. Log). The Investigator's Log reflects that Special Investigators, including Plaintiffs Smith and Carlson, were assigned to more than just the mundane tasks of locating witnesses or serving subpoenas; in fact, the Log references numerous investigations assigned to the Special Investigators by Akemann, Barsanti and other assistant state's attorneys (Ex. A, pp. 85-86, 91, 93; Ex. C, Investigator's Log).

18. Paragraph 18 mischaracterizes Barsanti's complete deposition testimony. See responses to paragraphs 6, 7, 8, 12 and 17 above.

19. Paragraph 19 mischaracterizes Barsanti's complete deposition testimony. See responses to paragraphs 6, 7, 8, 12 and 17 above.

20. Defendant admits the facts contained in paragraph 20.

21. Defendant admits the facts contained in paragraph 21.

22. Paragraph 22 mischaracterizes Akemann's complete deposition testimony. Akemann testified that that he would not keep a person in the position of Special Investigator who publicly supported his political opponent, publicly campaigned for his opponent, and publicly criticized his own competency, honesty and integrity as the elected State's Attorney (Ex. B, pp. 60-61).

23. Defendant admits the facts contained in paragraph 23 for purposes of the motion for summary judgment only.

24. Defendant admits the facts contained in paragraph 24 for purposes of the motion for summary judgment only.

25. Paragraph 25 mischaracterizes Akemann's complete deposition testimony. Akemann testified that that he would not keep a person in the position of Special Investigator who publicly supported his political opponent, publicly campaigned for his opponent, and publicly criticized his own competency, honesty and integrity as the elected State's Attorney (Ex. B, pp. 60-6 1).

26. Paragraph 26 mischaracterizes Akemann's complete deposition testimony. Akemann testified that that he would not keep a person in the position of Special Investigator who publicly supported his political opponent, publicly campaigned for his opponent, and publicly criticized his own competency, honesty and integrity as the elected State's Attorney (Ex. B, pp. 60-61).

27. Paragraph 27 mischaracterizes Akemann's complete deposition testimony. See responses to paragraphs 6, 7, 12 and 17 above. Akemann testified that, pursuant to statute, Special Investigators were appointed only by him and served at his pleasure (Ex. B, pp. 46-48). He also testified that he had the statutory authority to directly and personally assign anyparticular task or activity to his Special Investigators, and he did so (Ex. B, pp. 20, 49-52). In fact, the Investigators Log attached as Exhibit C hereto references specific assignments given Special Investigators by Akemann.

28. Paragraph 28 mischaracterizes Akemann's complete deposition testimony.

Special Investigators conducted investigations which

assisted the State's Attorney in the performance of his duties and attended policy-making meetings and otherwise had meaningful input into prosecutorial decisions. See response to paragraphs 6, 8, 12, 13 and 17 above. In addition, Akemann testified that he would consider and give weight to the results of a Special Investigator's investigation in making prosecutorial decisions, including whether to charge someone with a crime, bring a case before a grand jury, or continue an investigation further (Ex. B, pp. 52-54).

29. Paragraph 29 mischaracterizes Akemann's complete deposition testimony. Akemann testified that that he would not keep a person in the position of Special Investigator who publicly supported his political opponent, publicly campaigned for his opponent, and publicly criticized his own competency, honesty and integrity as the elected State's Attorney (Ex. B, pp. 60-61).

30. Defendant admits the facts contained in paragraph 30 for purposes of the motion for summary judgment only.

31. Defendant admits the facts contained in paragraph 31 for purposes of the motion for summary judgment only.

32. Paragraph 32 mischaracterizes Akemann's complete deposition testimony. Akemann testified that that he would probably not want to keep a person in the position of Special Investigator who publicly supported his political opponent, publicly campaigned for his opponent, and publicly criticized his own competency, honesty and integrity as the elected State's Attorney (Ex. B, pp. 60-61).

33. Defendant admits the facts contained in paragraph 33 for purposes of the motion for summary judgment only.

34. Defendant admits the facts contained in paragraph 34

for purposes of the motion for summary judgment only. However, Barsanti testified that Special Investigators can be, and have been, made agents of the grand jury, which is a confidential and secret proceeding, and that Special Investigators are responsible under the law to keep grand jury matters and information confidential and secret (Ex. A, pp. 88-90, 122-23).

35. Paragraph 35 mischaracterizes Akemann's complete deposition testimony. Akemann testified that only the State's Attorney has the power to appoint, remove and discipline a Special Investigator, and that Special Investigators serve at the pleasure and discretion of the State's Attorney (Ex. B, pp. 46-48). As State's Attorney, Akemann had the statutory authority directly and personally to assign Special Investigators to any particular task or activity, including to conduct investigations which would assist the State's Attorney in the performance of his duties (Ex. B, pp. 49-52). He could then require that the Special Investigator report back to him directly about his activities or the fruits of his investigation (Ex. B, p. 50). The State's Attorney would consider and give weight to the results of that investigation in making prosecutorial decisions, including whether to charge someone with a crime, whether to bring a case before a grand jury, and whether to continue an investigation further (Ex. B, pp. 52-54). In addition, see responses to paragraphs 6, 8, 12, 13, and 17 above.

36. Paragraph 36 mischaracterizes Akemann's complete deposition testimony. Akemann also testified that confidentiality would be a requirement and necessity for the position of Special Investigator (Ex. B, pp. 55-56). He also testified that the statute contemplated a close working relationship between a State's Attorney and his Special Investigators (Ex. B, pp. 57-58). He further testified that in

assigning a Special Investigator to conduct an investigation, he would need to trust that the Special Investigator was giving him accurate information and conducting the investigation in a proper manner (Ex. B, pp. 57-58). Akemann also testified that he would not keep a person in the position of Special Investigator who publicly supported his political opponent, publicly campaigned for his opponent, and publicly criticized his own competency, honesty and integrity as the elected State's Attorney (Ex. B, pp. 60-61). Similarly, Barsanti testified that the State's Attorney or his assistant would rely on information provided by a Special Investigator in making prosecutorial decisions, and that he would expect confidentiality from the investigator (Ex. A, pp. 69-75). He also acknowledged that inherent in the relationship between the State's Attorney or his assistant and the Special Investigator is an element of trust, i.e., that he would have confidence that the Special Investigator would tell him the truth and would not abuse their position in any way (Ex. A, p 75). He testified that he would not put a person in the position of Special Investigator who was antagonistic to the State's Attorney, or who politically supported the State's Attorney's opponent and was publicly critical of the State's Attorney (Ex. A. pp. 77-79).

37. Paragraph 37 mischaracterizes Akemann's complete deposition testimony. See responses to paragraphs 35 and 36 above.

38. Paragraph 38 mischaracterizes Akemann's complete deposition testimony. See responses to paragraphs 35 and 36 above.

39. Defendant admits the facts contained in paragraph 35 for purposes of the motion for summary judgment only.

40. Defendant admits the facts contained in paragraph 40,

but states affirmatively that Gorecki eliminated the positions of Special Investigators (Def. Stmt. Facts, para. 10).

41. Defendant admits the facts contained in paragraph 41, but states affirmatively that Gorecki eliminated the positions of Special Investigators (Def. Stmt. Facts, para. 10).

42. Defendant admits the facts contained in paragraph 42 for purposes of the motion for summary judgment only.

43. Defendant admits the facts contained in paragraph 43 for purposes of the motion for summary judgment only.

44. Denied.

45. Defendant admits the facts contained in paragraph 45 for purposes of the motion for summary judgment only.

46. Defendant admits the facts contained in paragraph 46 for purposes of the motion for summary judgment only. However, see responses to paragraphs 6, 8, 12, 17, 27, 28, 35 and 36 above.

47. Defendant admits the facts contained in paragraph 47 for purposes of the motion for summary judgment only. However, see responses to paragraphs 6, 8, 12, 17, 27, 28, 35 and 36 above.

48. Defendant admits the facts contained in paragraph 48 for purposes of the motion for summary judgment only. However, see response to paragraphs 6, 8, 12, 17, 27, 28, 36 above.

49. Defendant admits the facts contained in paragraph 49

for purposes of the motion for summary judgment only. However, see responses to paragraphs 6, 8, 12, 17, 27, 28,35 and 36 above.

50. Defendant admits the facts contained in paragraph 50 for purposes of the motion for summary judgment only. However, see responses to paragraphs 6, 8, 12, 17, 27, 28, 35 and 36 above.

51. See responses to paragraphs 6, 8, 12, 17, 27, 28, 35 and 36 above.

52. See responses to paragraphs 6, 8, 12, 17, 27, 28, 35 and 36 above.

53. See responses to paragraphs 6, 8, 12, 17, 27, 28, and 36 above.

54. See responses to paragraphs 5, 22, 25 and 26 above.

55. See responses to paragraphs 5, 22, 25 and 26 above.

56. Defendant admits the facts contained in paragraph 56

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57. Defendant admits the facts contained in paragraph 57

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58. Defendant admits the facts contained in paragraph 58 for purposes of the motion for summary judgment only.

59. Defendant admits the facts contained in paragraph 59 for purposes of the motion for summary judgment only.

60. Deny.

61. Defendant admits the facts contained in paragraph 61 for purposes of the motion for summary judgment only. However, see responses to paragraphs 6, 8, 12, 17, 27, 28, 35

and 36 above.

62. Defendant admits the facts contained in paragraph 62 for purposes of the motion for summary judgment only. However, see responses to paragraphs 6, 8, 12, 17, 27, 28, 35 and 36 above.

63. Defendant admits the facts contained in paragraph 63 for purposes of the motion for summary judgment only. However, see responses to paragraphs 6, 8, 12, 17, 27, 28, 35 and 36 above.

64. Defendant admits the facts contained in paragraph 64 for purposes of the motion for summary judgment only. However, see responses to paragraphs 6, 8, 12, 17, 27, 28, 35 and 36 above.

65. Defendant admits the facts contained in paragraph 65 for purposes of the motion for summary judgment only. However, see responses to paragraphs 6, 8, 12, 17, 27, 28, 35 and 36 above.

66. Defendant admits the facts contained in paragraph 66 for purposes of the motion for summary judgment only. However, see responses to paragraphs 6, 8, 12, 17, 27, 28, 35 and 36 above.

67. Defendant admits the facts contained in paragraph 67 for purposes of the motion for summary judgment only. However, see responses to paragraphs 6, 8, 12, 17, 27, 28, 35 and 36 above.

68. See responses to paragraphs 6, 8, 12, 17, 27, 28, 35 and 36 above.

69. See responses to paragraphs 6, 8, 12, 17, 27, 28, 35 and 36 above.

70. See responses to paragraphs 6, 8, 12, 17, 27, 28, 35 and 36 above.

71. See responses to paragraphs 5, 22, 25 and 26 above.

72. Defendant admits the facts contained in paragraph 72 for purposes of the motion for summary judgment only.

73. See responses to paragraphs 5, 22, 25, 26, 35 and 36 above.

74. Defendant admits the facts contained in paragraph 74 for purposes of the motion for summary judgment only.

75. Deny.

76. Defendant admits the facts contained in paragraph 76.

/s/ MICHAEL D. BERSANI,
One of the attorneys for the Defendant

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Phillip D. Carlson and Thomas Smith *Plaintiffs,*	)	
v.	)	No. 01 C 9235
Mary E. Gorecki, et al., *Defendants-Appellants.*	)	

THE DEPOSITION OF JOHN BARSANTI, called by Plaintiff, for examination, taken pursuant to the Federal Rules of Civil Procedure of the United States District Courts pertaining to the taking of depositions, taken before JEAN M. HINCKS, a Notary Public and Certified Shorthand Reporter within and for the County of Cook and State of Illinois, taken at 15 Spinning Wheel Road, Hinsdale, Illinois, on the 11th day of July, A.D. 2002, at 2:10 P.M.

REPORTED FOR ADVANTAGE REPORTING SERVICE
BY: JEAN M. HINCKS
CERTIFIED SHORTHAND REPORTER
REGISTERED PROFESSIONAL REPORTER

Direct-Examination by Mr. DeRose 4
Cross-Examinabon by Mr. Bcrsani 51
Re-Direct Examination by Mr. DeRose

Exhibits Identified:

Exhibit No. 1	51
Exhibit No. 2	82
Exhibit No. 3	84
Exhibit No. 4	107
Exhibit No. 5	109

PRESENT:

THE LAW OFFICES OF
JOHN P. DeROSE L ASSOCIATES
BY: MR. JOHN P. DeROSE
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On behalf of the Plaintiffs:

THE LAW FIRM OF HERVAS, SOTOS, CONDON 6
BERSANI, P.C. BY: MR. MICHAEL D. BERSANI
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On behalf of the Defendant,
Mary E. Gorecki, State's Attorney of Kane County;

ALSO PRESENT:
Ms. MEG GORECKI
State's Attorney

MS. M. KATHERINE MORAN
Assistant State's Attorney;

MR. ALLAN R. STASICA
Assistant State's Attorney;
AND
MS. SHARON LAW LARSEN
Attorney-at-Law.

(Witness sworn.)
JOHN BARSANTI,
called as a witness herein by the Plaintiffs, having
4 been first duly sworn, was examined and testified as
follows:
DIRECT-EXAMINATION
BY: MR. DCROSE
Q Sir, will you please state your name for the
record?
A John Barsanti.
Q Mr. Barsanti, have you ever given a 12 deposition
before in your experience?
A Yeah, I have.
Q Because I don't know what that experience
might have been, it might have been in a state court,
it might have been in a federal court, I'm going to
give you a little preamble as to what you can expect
here and because the rules of the different court
systems do vary from court system to court system
We are going to be taking this
deposition according to all the applicable rules of
the Federal District Court for the Northern District
of Illinois, the appropriate rules of the Seventh
Circuit Court of Appeals, and of the United States
Supreme Court that apply to the taking of .depositions.
During the course of this deposition,
to make sure that those rules are followed, counsel from
time to time will interject, and you being an attorney
probably understand that they have a unique way of
interjecting. Sometimes they use a word like objection, but

however counsel does interject, if you hear the attorneys in the courtroom -- or in this deposition room start to talk, if you could just stop talking until we have an opportunity to discuss on the record whatever the objection might be, we would all appreciate that.
In the course of the taking of this deposition, we do not want you to guess. If you do not know the answer to a question, there's no harm in telling us I don't know, or if it's something you believe you did know at one time but have since lost from the lexicon of your memory, you can tell us I don't remember or I have forgotten, and we will understand that.
During the course of this deposition, we will be taking periodic breaks, but if we have notcalled a break soon enough for your own personal comforts and needs, if you'll let us know -
A Fine.
Q -- we'll be happy to interrupt the proceedings for whatever purposes are necessary.
You are not represented by an attorney here today, is that correct, sir?
A Correct.
Q And you are here pursuant to a subpoena?
A 1 don't think I am.
Q I didn't give you a subpoena?
A No.
Q I know you did indicate that you wanted a i subpoena
A Right.
7 Q -- and if you do need a subpoena still -
3 A No, that's fine.
Q In the course of taking this deposition, we D need verbal answers, of course, to any questions that are asked. The reporter will take down verbatim everything that is said here today.
Do you have any questions about the

proceedings before we start into them?
A No.
Q. Mr. Barsanti, by whom are you employed at this time?
A By the Law Firm of Camic, Johnson, Wilson, & McCulloch. I have several jobs, actually. Do you want me to give them all to you?
o All right. Go ahead.
A I'm employed by the Law Firm of Camic, Johnson, Wilson & McCulloch of Aurora. I have a contract with the Illinois State Appellate
Prosecutor's Office, and I also am employed -- I am a contractor with Kane County to be what they call a conflict counsel.
o Let me just back up a little bit with you. The Illinois State Appellate -- did you say Defender's Office?
A Prosecutor's Office.
o Is that a part-time job?
A It's a contract. I bill them. They assign me to do certain things, and then I bill them.
o And your full-time or your most -- the practice that takes the most of your time, I take it,
is the Camic, Johnson firm?
A Right, right.
Q Then you indicated you have a third practice as a conflict -
A Counsel, right, within Kane County. If the Public Defender cannot be involved in a criminal case because they have a conflict, usually when there's multiple defendants, then I get involved in that, and that usually takes the form of juvenile court. That's the bulk of it is juvenile court.
Q And your work in that capacity would be as a defense lawyer?
A Well, in juvenile court, it depends.
Sometimes you're a guardian ad litem and things like that. You can play different roles, but I'd say probably

most of it is as a defense attorney.
Q Mr. Barsanti, I know that at one point you were an Assistant State's Attorney for Kane County, is that correct?
A Right.
Q When did you first become an Assistant State's Attorney for Kane County?
A October of 1979.
Q And was that an assignment immediately uponyour completion of law school?
A No. I finished law school in -- I took thebar in July of 1977, and then in like March or February of 1978, I started with the Illinois Department of Labor, and then I worked there. In November or October of '79, 1 signed on with the State's Attorney's Office.
Q And who was the State's Attorney when you first signed on with Kane County?
A Gene Armentrout.
Q Could you spell that last name?
A A-R-M-E-N-T-R-O-U-T.
Q And what was your titled position with the State's Attorney Office at that time?
A Assistant State's Attorney.
Q After Mr. Armentrout completed his teen as State's Attorney, did you continue with the office for an additional period of time?A Yes.k
Q For how much additional period of time did you remain with the Kane County State's Attorney Office?
A Till whatever the last day in November is, the 30th, I think, November 30, 2000.
Q And over the period of time that you were with the Kane County State's Attorney's Office, how many different State's Attorneys did you work under? 5
A I think it's five; Armentrout, Morrow,Casey, Johnson, and
Q The first of those names, Morrow, how would

iyou spell that?
0 A M-O-R-R-O-W.
Q Were these all male State's Attorneys?
A Yes.
Q Under Mr. Morrow, what was your titled position?
A He came in in December of '80. 1 was an Assistant State's Attorney until January of '86 when dhe appointed me chief of the Criminal Division.
Q Before he appointed you to the position of chief of the Criminal Division, what were your duties and assignments as an Assistant State's Attorney?
A Under Armentrout, I was in juvenile court, and Morrow put me in as a felony trial assistant, and I was a felony trial assistant from when he came in, which would be December of '80, until he made me chief of the Criminal Division.
Q. And then when he made you chief of the Criminal Division, did your duties and responsibilities change in some fashion?
A Yeah.
How did they change?
A As a trial assistant, all I did was work files. That's all I had to do, and we also had a felony screening function where we'd all take turns similar to felony review that they have in Cook County, similar to that, where we took turns doing that a week at a time, but I just worked files assigned to me. Now, when I was promoted, at that point, I did -- I supervised every criminal case, every criminal assistant, and I made every single deal, every single plea bargain was approved by me. I ran the grand jury completely. I did every grand jury hearing and every grand jury investigation and then still prosecuted. I still had some files, too.
Q. So, every single prosecution in the county then would

have passed through you at that point -
A Right.
Q. -- when you were running the grand jury proceedings?
A There was a lot less then than there is now, but yeah, that's the way it worked.
Q Then after Mr. Morrow was no longer assistant or no longer State's Attorney, you then worked under Mr. Casey?
A Right.
Q What was your titled position under Mr. Casey?
A I think he kept everything the same. Morrow left midterm or almost near the end of his term. He ran for judge and he lost, and then he went to private practice; like sometime in early '88 I believe he left office. I can't remember the time, but shortly before the end of his term he left.
Casey was appointed by the Kane County Board to be the interim State's Attorney, and he really didn't change anything. I still retained my position as chief of the Criminal Division under Casey.
Q Did Mr. Casey then after completing the term of Mr. Morrow run himself for State's Attorney?
A No, no. I think that was the deal he couldn't run or something like that, I think, if I recall how that went. That was his stipulation thathe wouldn't run, and after him came Gary Johnson.
Q And under Mr. Johnson, what was your titledposition?
A First Assistant.
Q And immediately upon Mr. Johnson becoming State's Attorney, did you get appointed as First Assistant?A Yeah, yes.
Q Now, as First Assistant State's Attorney, you were the highest State's Attorney in the office under the State's Attorney, himself?
A Right.
Q What were your duties and responsibilities then under

Mr. Johnson?
A Well, I don't know that they were all that different than what I did before. In fact, I would say they were the same. Just by title, I had supervisory authority over the people in the Civil Division, which I never had before. That really was more of a -- I think that was probably more -- I didn't do much in civil. I had a very limited supervisory role. I helped pick the chief of the1 Civil Division. I really didn't -- wasn't involved
in any of their stuff that they did, except in a very tangential way. I think the State's Attorney probably was more involved in that than I was, but for the most part, my job remained the same.
Q How long did you remain First-Assistant under Mr. Johnson?
A His whole term, for those four years.
Q And after his four-year term, you remained in the employ of the Kane County State's Attorney's Office under Mr. Akemann?
A Yes.
Q What was your titled position under Mr. Akemann?
A When Mr. Akemann came in, he abolished the job of First Assistant. So, there was no First Assistant. He made me chief of the Criminal Division, and he had a chief of civil, and I think after a while he had chief of juvenile, too, I don't remember, but that was my title, and for the most part, my job really didn't change.
Q So, your job then as both chief of criminal under Mr. Casey and Mr. Akemann and your job as First Assistant under Mr. Johnson, as far as you're concerned, was very similar under all of those persons?
A Even when -- when Morrow made me chief of the Criminal Division, he had a First Assistant, and

he didn't have a First Assistant after that either. So, yeah, for those periods of time, it was the same.
Q. Have you ever run for political office?
A Yes.
Q. What political offices have you run for?
A Kane County State's Attorney.
Q. And when did you run for Kane County State's Attorney?
A 1992.
Q. So, you would have ran against Mr. Akemann? A Yes. And Mr. Akemann defeated you for the position, is that correct?
A In the primary, right.
Now, after Mr. Akemann ascended to the position of Kane County State's Attorney, was there any discussion between you and him as to whether or not your position with the Kane County State's Attorney's Office was going to be eliminated?
A You mean as the First Assistant?
Or even as an employee.
A See, I'd known Dave for a long time because he had been in the office when I was there. When I first started, he was in the Civil Division, and I think he was chief of Civil Division for a while, and when Gary came in, he left. I didn't know where he was working at that time. So, after I lost, I went to Akemann, and I told him that I wanted to remain with the office, and he said, well, let's give it six months and see how it turns out. I thought that was a good idea, and after six months or so, you know, things were working out okay, and I remained.
Q. As the chief of the Criminal Division, did you have under the various State's Attorneys that you worked responsibilities for developing policy in the office from time to time?
A Yes.
Q. The first time in your opinion you were involved in a

policy-making position under which State's Attorney would that have been?
any support among those people for your candidacy?
A I couldn't tell you that everybody did, but a great number of them did. I think at the time my wife was a clerical employee in the office. So, we knew a lot of those people pretty closely.
Q. The investigators, the civilian investigators in the State's Attorney's Office, did you have the support of any of them for your candidacy to be State's Attorney?
A Yeah, yes, You know, I'm trying to think about that period of time, and I'm thinking there was a guy named T.J. Strickland was an investigator, and also, there was a guy named Frank Knight, who was a Batavia police officer. Strickland had been an Elgin police officer,
iQ And as you remember it, did Mr. Strickland and Mr. Knight support your candidacy? i A Yeah.
Q When you lost in the campaign against Mr. Akemann, do you know whether any of those Assistant State's Attorneys who had supported your candidacy were ultimately terminated from their employment after Mr. Akemann became State's Attorney?
A I don't remember anybody. I would say no.
Q. Was there, to your knowledge, any of the civilian employees, clerical help or investigators, who lost their employment because they had supported your candidacy after Mr. Akemann ascended to his position?
A No, not that I know of.
Q As far as you understood it in Kane County, was there a requirement that one be a member of a particular political party in order to be an Assistant State's Attorney in Kane County over the years that you had been working in the office?
A No, I was never aware of that.

Did there exist in Kane County during the Period of time that you were an Assistant State's Attorney, the chief of the Criminal Division and t later First Assistant State's Attorney, ever a requirement that investigators be members of a Particular political party?
A Not that I'm aware of.
Q. Over the period of time that you were working in the Kane County State's Attorney's Office, did you yourself, become involved in working with the 2 investigators in the State's Attorney's Office? 3 A Yes.
Q Did your involvement with the investigators 5 change over the period of time that you were in the 6 office from its inception until finally when you 7 left?
A Yes.
Q How initially was your involvement when you 1o were a trial Assistant State's Attorney? What i I initially was your involvement with the investigators?
A Early on, I'm going back to when I was just an assistant, the investigators served paper, served subpoenas, because at the time, the Sheriff's Department was -- the opinion was -- and I was just working within the policy of the office, but the opinion was the Sheriff's Department didn't serve subpoenas all that well, and the only way we could really count on subpoena service getting done was to have our own investigator do the subpoena service, and that was by far the bulk of it. When I was an assistant, I would need to get somebody subpoenaed, and I would instruct an investigator to go and subpoena somebody or take a photograph. Sometimes that would happen, or in limited situations, go and interview a witness that may testify and things like that. That was my involvement as an assistant. I would characterize that as trial assistant. That was my involvement with them.
Q. And this would be when you were working in preparing

cases for presentation, prosecutions in the court system?
A Right.
Q. Would these investigators then work in conjunction with you in making that preparation, follow your direction?
A Yeah. I told them what to do, and they would go and do it. I mean, I didn't sit down with them and discuss trial strategy or anything. It was just really basically a function of: I need a photograph of that building and I need it by tomorrow and could you go out there and do it, and that's really what they did for us.
Q. During that period of time that you were an Assistant State's Attorney using the services of the investigators for your courtroom presentations, were any of those investigators ever involved in any policy-making decisions in your office?
A When I was an assistant?
MR. BERSANI: Are we talking about investigators employed by the Kane County State's Attorney's Office; is that what you're talking about?
MR. DeROSE: Yes, that's what I'm asking about. gy MR. DeROSE:
Q. First of all, let's clarify that. When I talk to you about investigators in the Kane County State's Attorney's Office, are there different kinds of investigators?
A I suppose I'd have to answer that by saying at what period of time?
When you were an assistant.
A In the early days when I was an assistant, there were very few investigators. I think the most that I ever recall having is two, and there were some that -- during that period of time, there were some that were directly hired by the office and paid by the office, but there were times when we had assigned people from like the Sheriff's Department, if I

recall, once or twice we'd have people assigned to 2 us, but my recollection is most of them were 3 employees.
Q. Employees of the State's Attorney's office? A Right.
Q. We're talking about those early years now when you were an Assistant State's Attorney. Do you remember the names of the investigators who were hired by your office to be investigators at that time?
A My earliest recollection of an investigator is a guy named Ray Schuett, who was a retired Geneva policeman. I think he was there when I started.
Q Could you spell his last name?
A And this is a guess, S-C-H-U-E-T-T.
Q Was there any other investigator in those early years that you remember besides Mr. Schuett hired by the office?
A We had Wayne Henke.
Q Spell his last name.
A H-E-N-K-E. He was a retired Elgin Policeman.
Q Anyone else you remember?
A We had a guy -- I can't remember his name. He later died of cancer. I can't recall his name. I don't think he'd ever been a police officer, and I'm sure there were others that I can't recall.
Q. Do you remember the names of any of the investigators that had been assigned or detailed to your office from the Sheriff's Department in those early years?
A We had some people detailed to us from other bigger departments. We had a guy named Ray Weaver detailed to us from Aurora; I remember that.
Q. That would be W-E-A-V-E-R?
A Yeah, and it seems to me we had -- I'm not even sure about this. What name comes to my mind is a guy named Ken Anderson for a while from the Sheriff's Department who was detailed to us. There are others. I

can't recall their names.
Q. Now, when you then ascended to the position of chief of the Criminal Division, you indicated that your responsibilities in the office were increased dramatically, is that correct?
A Right.
Q. Did your contact and supervision over investigators change in any way once you became chief 2 of the Criminal Division?
A Yeah. I became their boss, their direct 4 supervisor.
Q Now, do you remember the names of the investigators who were actual employees of the Kane 7 County State's Attorney's Office when you were s working as chief of the Criminal Division under Mr. Morrow?
A Wayne Henke was under both those administrations, I recall that.
Q Anyone else?
A I'm drawing a blank now. There was a long line of them. As I sit here, I'm not being able to dredge up any other names.
Q But as the direct supervisor of the investigators for the Kane County State's Attorney's Office, what was your actual contact with them? What were you responsible for with them?
A I gave them assignments.
MR. QERSANI: what time period are we talking here?
MR. DCROSE: I'm asking about under Mr. Morrow, .and then I'm going to go on.
By MR. DeROSE:
Q Now, Mr. Morrow was State's Attorney under what period of time?
A I think 'SO to '87, approximately.
Q And when about was it that you became chief of the criminal Division?
A January of '86.

Q. So, from 1986 to the end of Mr. Morrow's ten, you gave the assignment to the investigators, right?
A Except this is what we used to do with it.
Keep in mind that that office was a lot smaller at that time. If a felony assistant needed paper to get served on somebody, he would go directly to the investigator and say, Could you serve this paper now? If there were disputes involved or because we only had -- for a period of time, we only had one guy, and his jobs were divided. If I told him to do something and somebody would come in with a subpoena that needed to get served, I would mediate that and direct him which one to do, and that kind of thing, but the assistants didn't have to clear it through me to get
a subpoena served, but other than that, though, it had to be cleared through me.
Q. Sometime after that initial direct supervision, did you develop some kind of a system that changed the way in which assignments were given to investigators?
A I didn't actually develop a written system or even a system -- any kind of formal system until after Akemann came in.
Q So, it was more -- sounds like a more catch-as-catch-can by whatever assistant who could find an investigator who had some time to do whatever assignment he wanted until you developed this new system under Akemann?
A Right.
Q. This system you developed under State's Attorney Akemann, when did you do that, immediately after he took office?
A No. My recollection is that we started -we put that into place when we went to the new building. That would have been '93.
Q. And who was involved in putting the new System into practice in '93?

A Me.
Q And you just got approval from Mr. Akemann?
A Well, my remembrance of this is that I told 4 David that I think we need to take a little tighter
5 control over what the investigators did because we 6 had a lot more cases, and at that time, the office 7 changed in this sense, is that Akemann brought in 8 this idea that we -- and we paid private subpoena 9 service. So, the actual investigators only served
what I always called panic subpoenas. You know, it's Saturday night and you realize you don't have this guy's papers. The investigators would do panic
subpoenas, but for the most part, we had private subpoena service, which was paid for out of the budget. So, what happened was that freed up some time for the investigators to do some other things, and because of that, I thought we needed to put some procedures in place about the stuff they did because they were doing more than serving paper at that time, and so, I talked it over with Dave. He said, yeah, do what you want, and then I put something together, and I had him look at it, and I said he thought that was all right, and then we put that in place.
Q Under Mr. Akemann, how many investigators did you have?
A Well, again, you have to think about periods of time on this because it changed. Early on, we had two.
Q Who were they?
A They were Dave Moore and Phil Carlson. Now, sometime after that, I think it was '94, they opened a Child Advocacy Center, which was -- it escapes me exactly how that was funded early on, but if I
remember correctly, there was a grant funding in that or else it was just like a line-item funding from the county board, and part of the charter or the proposal

14 for the Advocacy Center, which I didn't have anything to do with at the time, was investigators, and when the Advocacy Center started going, there was some money there for investigators. Now, early on, it wasn't much, and we took people in from -- we took people from the various departments like Aurora and Elgin, various police departments, were assigned to the office as investigators for the Advocacy Center but were not paid by us. They were paid by their respective departments, and it was sometime after
Akpnann came in, I'm thinking this is like '96 maybe, thing like that, they received some domestic violence grant, we received some domestic violence grant, of which written into that grant proposal, again, of which I didn't have anything to do with at
the time, was investigator.
Q. And was an investigator then hired?
A yeah. We filled all those investigator
spots.
Q Do you remember the names of the investigators that you hired with the grant funds?
A I think the first domestic violence investigator was a guy named Jim Kintz, my recollection of it.
Q. Can you spell Mr. Kintz' last name?
A K-I-N-T-Z. He was a retired St. Charles policeman, and the Advocacy Center investigators changed a lot because we always got the feeling they dumped their worst guy on us, and it was not a good situation, and that changed a lot over a period of time. So, I don't know, and sometime in there, we had another position, and a woman by the name of Ramona Piec was hired.
Q. Can you spell Ramona's last name?
A P-I-E-C.
Q. Now, are you the person who interviewed Mr. Kintz and Miss Piec for -
A I had nothing to do with Kintz. Kintz was hired before --

when I was chief of the Criminal Division and not First Assistant, I had nothing to do with hiring other than my own assistants. The rest of the hiring in the office, which would be support staff, the Civil Division, the Juvenile Division, things like that, were done -- they had nothing to do with me. Kintz was hired. I didn't have anything to do with Ramona Piec I hired. I Interviewed her. That was later on.

Q.as there any requirement as to -- or any inquiry by you as to what her political allegiance was by way of party politics when you hired her? A No.

Q Now, you mentioned that there were two investigators in the Criminal Division that were funded you believe -- their salaries were funded by the county, Kane County, Mr. Moore and Mr. Carlson?

A Right. Moore I think -- I could be wrong about this, but I think when Moore first came on he 2 was assigned by the Sheriff's Department to us.

Q Did he at some time later then become a paid employee A.He retired at some point from the Sheriff's Department, and my recollection is that then we paid 7 him.

Q Did he have a titled position with your office other than investigator?

A No. He might have been chief investigator. I I When Phil came on, I think we made -- if not in title, at least in practice, because Dave had more criminal investigation experience at the time. Dave had like 25 years with the Sheriff's Department. He was like the lead investigator. I forget which terminology we used, but he was like the No. 1 investigator.

Q Did you have any input into the hiring of Mr. Moore as an investigator after he left the Sheriff's office?

A I think I did. I think that was about the 22 period of time when I started to do that. I was eing asked to be involved in those decisions a lot ore.

Q. Was there any requirement when you hired Mr. Moore as an investigator for the Kane County State's Attorney Office as to what his political allegiance was?
A I knew what it was.
Q What was it?
A He was a Democrat, I knew that. I don't recall it ever coming up in an employment interview, though.
Q. So, there was then, I take it, no requirement as to what political party he had allegiance to in order to hold a position of investigator in the office?
A Right.
Q. Phil Carlson, did you have input into the decision to hire him?
A I don't know that I had any input in that decision. I remember when -- I think Phil ran for clerk. I may have the years goofed up. I think after Phil ran for clerk and lost, I think then he came on with the State's Attorney's Office, I think.
Q.Do you know who hired him?
A ave, and I remember Phil coming on, and my recollection is that Dave said, what do you think of phil Carlson coming on as an investigator, and he put it past me, but that was neyer put to me in a situation like that I was involved in making the decision on Phil. I think he asked my input. Maybe Iny input would have made a difference, but my understanding at the time was that this was someone that Dave had selected, and I had no objection to it at the time.
Q.s there, as far as you understood it, any requirement that an investigator at that time of these hirings that that investigator be a member of one or the other political party?
A No.
Q. a matter of fact, from what I'm hearing you say, Mr. Moore was a Democrat and Mr. Carlson was

a Republican?
A Right.
Q. Now, when you changed the procedures in approximately '93 where you got tighter -- you indicated you changed the procedure to gain tighter control. What did you do to the procedure that gave you the more tight control over your investigators?
A See, everything up to that time -- I think you described as catch or catch-can. That's about exactly the way it was. There were really no records of the cases they worked, and there were really no files about investigations they might have been working on, and because we were getting much busier, I think, you know, we doubled in prosecutions and case filings within a very short period of time. I really felt we needed some control over what everybody was doing. So, I developed a protocol for the assistants on what they should do. I developed the protocol for the investigators of what they should do and a series of forms, among them like an investigation form, which an assistant was required to fill out with certain information, which they'd give to me, which required my signature before the investigator would be required to perform the work, that that was laid out then. Now, that would apply for subpoenas still at this point in time because we had a separate subpoena setup where we had a person that logged the subpoenas whenever they were issued because there was a great deal of them at this time, logged subpoenas, and then if there was a panic subpoena, though, that had to get approved by me. If they wanted the investigators to serve subpoenas, themselves, that had to get approved by me.
One other thing that we did at that time was to -- this was during the period of time when the law of grand juries changed drastically, and the old thing we used to do would be to have them issue a subpoena,

and then we would mail a subpoena to somebody to get grand jury information. There was a case out of DuPage County and Will County where they found that to be an error, and you had to appoint people to be grand jury investigator.

So, at times, when we needed -- like the grand jury was going to be -- we wanted to subpoena phone records, for example, the grand jury wanted a phone record, I would have them issue the subpoena, then I would appoint one of these guys sometimes, one of the investigators sometimes, to go and actually serve the subpoena because that in my view was what the new law required. So, they got involved in that, too, which they had never been involved in before.

Q As your chief investigator, I think you called him, Mr. Moore, did he have any further responsibilities as you were setting up this protocol over the other investigators that you had in the office?

A The only person I think he had -- it's much looser than saying there was a supervisor. I think he was the lead investigator over Phil, and that was more of a corroborative effort than it was actually Dave more, you know, laying down rules and giving him specific assignments. I think they more or less discussed what each other were going to do, that was my understanding of their role, but Dave was the lead guy. I don't believe Dave had any supervisor authority over any of the other investigators.

Q Besides Mr. Moore and Mr. Carlson, what other investigators did the office employ under Mr. Akemann?

A Again, periods of time would change this, because when the domestic violence grant came, we hired an investigator. When the Advocacy Center started to go, there was a series of investigators that worked there, and near the -- we, I was made First Assistant again in December of '98 by

Mr. Akemann, and that year we drew up a budget for the 4-D, the Child Support Unit, and we wrote an investigator into that budget, too.

Who did you hire?

A I think Ramona Piec was paid out of that budget, at least partly. I'm not real clear on how that worked at the time, but there was money in the child support, the brand new child support budget, which had to get approved by the state for an investigator, and an investigator at some point was hired under that.

Q Did Mr. Thomas Smith become an investigator 4 at some point under -

A At some point in time, I think Tom Smith came on after Dave left. That's my recollection of how Smith came in.

Q Who hired him?

A That was a similar situation as with Phil. Dave brought me in one day and said what did I think 1 of T.R. Smith, and I knew him, and he said if I had ,2 any objection, could think of any reason not to hire 3 Smith, and I said no.

Q. How did you know Mr. Smith before his hiring?

A I think he was involved in somebody's political campaign. I can't remember how that was. I think he was a committeeman, and I was a committeeman. So, I think there was some Republican party politic thing that we knew each other from. He was a Cook County deputy. So, I had really no law enforcement experience with him.

Q. In determining the qualifications of individuals to be investigators for the Kane County State's Attorney's Office, did you ever consider the background of these applicants for these positions and was that important in any way?

A Well, the background was, yeah.

Why is that?
A Well, we wanted -- keep in mind, I had -- I don't know that I ever interviewed an investigator until later on after I was First Assistant. I know I might have been consulted when I was chief of criminal and maybe my opinion was asked for, but
didn't personally interview investigators until later, because at some point in time, I changed the policy. I interviewed everybody. I interviewed every secretary, every lawyer, everybody, but before that, when I interviewed investigators, we needed some kind of background which would be useful in what they did. It didn't necessarily have to be police background because I think near the end we hired - we had guys who had been probation officers and things like that, but I didn't necessarily need a police background as I needed somebody who had some kind of knowledge of the system or at least some kind I I of knowledge gaining and gathering information and things like that.
Q Once Mr. Smith joined the office, did you observe his work as investigator for the Kane County State's Attorney's Office?
A Very closely. He worked directly under me.
Q And can you describe your opinion of his ability to do the kinds of functions that were required of an investigator in the Kane County State's Attorney's Office?
A Well, he's one of the best investigators we ever had, I thought. I don't know that there's anybody ever better than T.R. because he had a lot of police background and very cooperative, and a part of being an investigator at that time was these crazy jobs like: Can you go pick up this guy at the airport Sunday night at 10:00 p.m., things like that, and if somebody was flying in from another state.
We used to have a pathologist from

Cook County who did our autopsies who didn't drive, and somebody had to pick him up from the train station at 6:00 o'clock in the morning, and stuff like this. Those are the kinds of things that they had to do, and besides being able to know how to interview people and understand about what investigators did, they needed to be able to cooperate with us on those kinds of things, and T.R. was very good in all that stuff, very cooperative.
Q You as chief of the -- well, strike that.
You, as First Assistant State's
Attorney, I take it, were privy to and part of the policy-making decision arm of the Kane County State's Attorney's Office?
A Right, I was.
Q When you were chief of the Criminal
Division, were you also part of the policy-making arm of the Kane County State's Attorney's Office? t'A Yes.
Q And when policy-making meetings were being
who would be in those meetings?
A We had a regular weekly meeting. This is
under Akemann, because before Akemann, it was just me ad die State's Attorney most of the time. They weren't regularly scheduled. Under Akemann, he had regularly weekly meetings in which the chiefs of the divisions would be present; that would be civil, criminal. For a while, we had the guy who was head of the misdemeanor traffic area, the administrative chief, and then the person who was running the AdvocaeY Center at the time, I think that was the crew, and they would be -- I don't know if I said juvenile, but juvenile was in there, too. We'd come to this weekly meeting at which policy issues were discussed, but there would be times when Akemann would want you to come in, and we'd sit in his office, and it may be just me and it may be me and some other chiefs, things like that, where we would discuss issues, policy issues.
Q And prior to this weekly meeting that you

remember taking place under Mr. Akemann where there would be policy meetings, do I understand you to say it would only involve whoever was the State's Attorney at the time and yourself?
A Yeah. It was very informal, it was very informal. I don't know that we ever had a real formal meeting like that prior to Dave; I don't think we ever did.
Q At any time when you were an Assistant State's Attorney or the felony assistant or the -excuse me -- the chief of the Felony Division or the First Assistant, at any policy meetings that you personally attended, did you ever have an investigator from the office participating in those policy-making meetings?
A They weren't a member of those meetings, but there were times when there may be an issue which we were all dealing with that may have -- an investigator may have had some information on when they were called in to give a report or something like that. Investigators were present at times during those meetings as were assistants at times and
other people at times were present to give input, but this was a pretty -- he didn't want -- I'm talking about Akemann. He did not want anybody usually who wasn't part of this supervisory crew to be involved in there because in his mind he wanted to be able to speak openly without having to worry about offending somebody who he didn't want to offend.
Q. In the years of experience you had with the Kane County State's Attorney's Office, was any investigator ever, in your experience, allowed to make policy for the office?
A No.
Q. Did any of the State's Attorneys under whom you worked ever in your presence require knowledge of the political party allegiance of any of the investigators who worked in the office?

A No.
Q. In your experience and in your opinion, was the requirement of political allegiance necessary in order for an investigator to do the work of investigator for Kane County State's Attorney's Office?
A No.
· You've already voiced your opinion as to the quality of work performed by Mr. Tom R. Smith as an investigator for the Kane County State's Attorney's Office. I ask you, do you have an opinion as to the quality of work that Phil Carlson performed as an investigator for the Kane County State's Attorney's Office?
A Yes.
· What is that opinion?
A When Phil first came on, he was not familiar with police work, which there's a part of that job that requires some familiarity with it. He wasn't familiar with the Criminal Code at that time. Parts of it he might have been, like the Vehicle Code, but the Criminal Code he was not. He had never been a -or performed a role like a police investigator before. So, those kinds of things he was not used to or had a lot of background in.
Now, there are other things which he did know a lot about. He knew the county. I mean, you say there's a tree on Sheffield Road that's three quarters of a mile down from the gate, and be would know where that was. If you had to find somebody in Aurora who could find a person for you, Phil could do
He had a really long history and knowledge of county, just the county itself, which was very helpful. You have to find people or you had to serve :paper on somebody, he would be able to do that.
Phil is a very tenacious kind of a guy.
You would give him some kind of thing to do, and he would follow it through until it was done. Those kinds of qualities were good, and he was willing to

go out and beat the bushes for you and drive a guy at 2:00 o'clock in the morning someplace if you needed to get done. He was cooperative in that area, and early on, Phil and I kind of were at -- we didn't get along all that well early on because he perceived me as trying to tell him how to do certain things, and he was absolutely right. I had an idea of how he should do things, and I don't think he appreciated it because early on he wasn't used to writing a report about something, and I'd get a report, and I didn't think it was good or I didn't think it told me what I asked him to find out, and I would send it back, and I'd say, do this, and Phil, who had come from a long line of being a self-employed guy, to basically -and when he worked for the Secretary of State, I understand he had pretty much a free rein of what he did, to having somebody come in who was obviously younger than he was and to tell him exactly what I wanted him to do and then arguing with him at times about what I needed to get done. He didn't like that very much, but as time goes on, it got smoother. He got much more cooperative with that, he learned a lot more, and by the time we ended, I mean, Phil could write a good report. I was satisfied with his reports. He and I were able to discuss things that needed to get done, and he picked it up fairly quickly and was very productive.

Q Did you believe then that he was able to do all of the job responsibilities that you gave him an investigator for the Kane County State's Attorney's Office as you trained him to do?

A Yes.

Q Did either Phil Carlson or Thomas R. Smith at any time tell you that they wouldn't do a Particular task because it violated their perceptions of political allegiance in any way?

A No, no, never.

a.. Q At any time did they ever refuse to do any of the tasks that you assigned them?
A Never.
MR. DCROSE: I have no further questions. Counsel, you may inquire.
MR. BERSANI: Okay. CROSS-EXAMINATION BY: MR. BERSANI
Q. Mr. .Akemann was the elected State's Attorney while you were working with the State's Attorney Office, correct, from approximately what, 1990?
A '92 till 2000, yeah.
Q. As the elected State's Attorney, Mr. Akemann was the final decision maker in the office, correct?
A Yeah, that would be accurate. There were a great many decisions that were made that we didn't bring to him because we felt they were just routine.
Q. Ultimately, though, if he didn't agree with something that you did or a decision you made, he could override that?
A Yes, absolutely.
Q. Essentially, as an Assistant State's Attorney, as a First Assistant, as the chief of criminal, whatever position you held, when you acted
Page 52 on behalf of the office, you basically stood in the shoes of Mr. Akemann, correct?
A In his name, right.
Q. Are you familiar with the powers and duties of the State's Attorney as defined by statute?
A I couldn't recite them for you. I've seen them and read them before.
(Exh. No. I identified.)
BY MR. BERSANI:
Q. Okay. Let me show you Deposition Exhibit No. I with today's date. If you could take a look at that.
ADo you want me to read it?

Take a look at it.
This is, for the record, 55 Illinois Compiled Statutes, 5/3-9005, powers and duties of State's Attorney.
A Yes.
Q. Could you briefly look at that and tell me if that's what you have reviewed before and know to be the powers and duties of State's Attorney?
A It looks like it, yeah. I have no reason to think that's anything different.
investigator pursuant to statute; is that your understanding?
A Well, again, this is my understanding. Now, I'm not citing anything., I'm not looking at any documents. When that statute came into effect, my understanding was that to actually carry the gun, there was some kind of background you had to have, and I don't remember what it was. I think if you didn't have any police background at all you had to go through this inordinate amount of schooling, just like a 40-hour course; I can't remember.
400 hours?
A Something, it was a lot, and it was difficult, and Phil didn't have -- he'd never been a sworn police officer. So, he had to arrange to satisfy those criteria in order to be a special investigator. Special investigator, I'm throwing the term. I didn't know that there was any special title of it. That was my understanding of the law.
Q. Now, if Mr. Akemann as State's Attorney had the power of appointment, you would agree with me that he also had the power of removal, correct?
A Sure.
Of investigators?
A Yes.
Q And he would also have the power of discipline of investigators if it was necessary? A Yes.

Q. And by discipline, I mean employment discipline.
A Yes.
Q. You'd agree with me that then special investigators basically served at the pleasure of the
I State's Attorney, correct?
2 A Sure.
Q And there wasn't any legal duty to employ special investigators or investigators in the State's
5 Attorney's Office at all, was there?
A No. In fact, I remember discussions about this, and I think he was of the opinion that he could have just regular investigators who wouldn't be allowed to carry a gun and couldn't arrest anybody and that kind of thing, who could perform functions, that they could still work, because I know Ramona . Piec I think still works there, I'm not certain, but
. Ache wasn't a policeman. She worked for the State Police, but she was not a policeman sworn, and he wanted her to go through that gun training thing, and she freaked out in the middle of it or something and didn't want to carry a gun, and we brought her back and gave her other duties in investigative areas, and she was not clearly a special investigator as defined by this.
Q. That's what I was going to ask you then. What about Jim Kintz, he wasn't a special investigator as designed by the statute, was he?
A I don't know that. He was an ex-cop. I don't know that.
Q. Was he authorized by the State's Attorney to carry a weapon?
A I don't know that. I don't really know that.
Q. Do you know whether he went through the 400-hour training course -
A He wouldn't have -
· Let me finish. He wouldn't have to?
A That was my understanding. If you were a retired policeman, I didn't think you had to do it.

So, it sounds like during the tenure of Mr. Akemann Phil Carlson and T.R. Smith were the only special investigators as you understand the statute, correct?

A To tell you the truth, I couldn't answer that for you. I don't know what Kintz was. I don't know what the guys in the Advocacy Center were either, to tell you the truth.

o Now, what was Mr. Akemann's role in giving assignments to investigators during your tenure with them?

A He wasn't in that -- directly in that loop. That completely -- the way I set it up in response to things which I felt were getting a little out of hand, they had to report directly to me. The way I set up the procedure was I didn't want them to do anything without prior approval, and when I say out of hand, what was starting to happen was walk down the hallway and an assistant in every door would pull them and say, hey, you know, you got to get this for me, you got to get this for me, and this wasn't enough time. So, I had set up the procedure where everybody had to come to me and get my signature on a work order, so to speak, before they did anything.

MR. BERSANI: Anything else, John?

MR. DeROSE: Go ahead.

THE WrTNESS: It never was their function to perform like a policeman and to start an investigation, develop an entire file, and come back with recommendations for charges. That's not what they did. When I was there, I termed it as trial support, and that involved serving subpoenas at mss, and serving subpoenas is a very time consuming base process, and even though they didn't have that many subpoenas to serve as compared to the private subpoena service people, they were most of the time -- they were doing that or what I call trial assistance for the trial

Assistant State's Attorneys, giving them pictures or finding an address or things like that. To call what they did a complete investigation, I wouldn't call it. I used to call it trial assistance.
20 BY MR. BERSANI:
Q Well, under the umbrella of trial assistance, they would be assigned to investigate things, correct, interview witnesses, follow leads, review records, those types of things, correct?
A They would -- I guess my only response to that can be this because I have to answer generally no to that because it was done at such more piecemeal of a method than that. If I needed a record, they may have to go get a record. If I wanted a statement of a defense witness who we didn't know who it was, I'd send them out and take a statement from what they remember, but it would be very, very seldom -- I can't say never because I know it did happen at times. It was very seldom that they had like an investigation where they performed a complete investigation of a potential criminal act. It was very seldom that that happened.
Q Okay, but pursuant to your understanding of the statute, a special investigator as having these Police powers and these investigatory powers, that type of power that you just spoke of was certainly within the purview of that, correct?
A Probably is, right. I think the bigger offices have more like a police force mentality in them.
Q Now, the statute says that to conduct investigations which assist the State's Attorney in 2 performance of his duties. Would it be fair to say 3 or your understanding is that the State's Attorney's 4 duties are very broad, correct? 5 . A Well, as defined by the act here, it is a big broad area to investigate and prosecute criminal acts occurring in the county; it's pretty broad.

Q The State's Attorney can exercise authority in civil matters, correct?
A Right, right.
Q And administrative matters, obviously, 12 within his office?
A Within his office, sure.
Q The State's Attorney's responsible for the 15 grand jury?
A Right.
Q State's Attorney can investigate official 18 misconduct?
A Right.
Q And that would involve county officers or 21 even officials from municipalities?
A Potentially, correct, that's true.
Q And the State's Attorney obviously could investigate employee disciplinary matters within his office, correct?
A Sure, yes.
Q. And so, theoretically, under the statute here with the special investigators, the special investigator could be assigned to investigate any of those matters we just discussed, correct?
A Yeah, I would agree.
Q. And you would agree that it was the State's Attorney's discretion to utilize special investigators in any manner in which assisted in his duties, correct?
A Right. I guess the only caveat would be: that would assist in his duties. They don't have cart blanche to do whatever they wanted, but certainly anything that would be allowed by the statute. He'd have discretion to use them however he wanted.
Q. Now, when a special investigator is assigned to a particular activity, and let me focus on investigations, because the statute we've already agreed allows that. Let's say a special investigator is assigned to an

investigation and the investigation
of the investigation back to uie State's Attorney or
the assistant, there may also be questions of the
~ investigator as to any conclusions the investigator
drew regarding their investigation, correct?
`~ A I lost you.
Q Badly asked question. Let me just ask directly. If you
assigned a special investigator to go out and interview a
witness and that witness may be important to a
subsequent prosecution, the credibility of the witness, for
example, might be an
issue, correct?
A Absolutely.
Q You would ask a special investigator, you
know, is that a credible witness, right? I mean,that's
within the realm of possibility, potential, in
this process that we talked about, correct?
A In my experience, I might have asked that
is question, you know, did you believe them or did they 19
appear believable? Yeah, I guess that would be true.
Q Okay, and they have to draw a conclusion and
tell you what they think?
A That would be part of their job to tell me what they
thought
Q You'd rely upon that in your prosecutorial decision,
correct?
A If I asked that question and they gave me an answer,
again, I would always weigh this against
S other things, too. I could rely on it at times,
yeah.
Q So, it would be accurate to say that in the course of
assigning a special investigator to an investigation and
that person bringing you back information, bringing you
back those types of conclusions we talked about, that the
investigator has significant input into your prosecutorial
decision?

A Well, I'd have to disagree with that because the prosecutorial decision whether or not to Prosecute or to prosecute, the ultimate prosecutorial discretion about how these laws should be enforced or Prosecuted, that was never part of their job, and there were times when they would have recommendations for me or opinions about people which I did not accept. If I asked for an opinion, I may accept it, May rely on it, but what they said never controlled whether anybody was prosecuted or not prosecuted or any final decision.
Now, could it be that they might have some impact on -- if an investigator came to me and said, you know, I talked to this guy, he looked like a.hcroin addict, that may mean something to me. I might think about that guy's credibility. That may have played a small part in something to do with that prosecution, but to say that that was a major impact on what the decisions that the prosecuting authority had, I would have to disagree with that.
Q. But there was some input there that would possibly affect your decision?
A Their information may affect small parts of how we did our job, that's accurate.
Q. And if you assigned a special investigator to a task, inherent in that is a element of trust between you and the investigator, correct?
A Yes.
In what way?
A Well, I'd have to have some basic idea that they would tell me the truth and that they would not abuse their position in any way, I guess. I'd have to have some confidence in that.
Q. Confidence that they're honest and integrity -
A Right, as anybody else that worked there, you have to have that feeling.

Q. How about loyalty? I don't mean political loyalty belonging to a party; I mean loyalty to the State's Attorneys and the assistants.
A I think that -- you know, there's different degrees of that. If there was somebody who worked for the State's Attorney who clearly hated the State's Attorney and was antagonistic to anything that the State's Attorney would want to do and would immediately take the other side of any kind of question, I mean, that's not clearly the kind of person you can work with, but did they have. to agree and did they have to like people, I don't know that that's all -- I used to tell people all the time, including investigators, that I didn't care if they liked the other employees as long as everybody worked together and was able to respect each other and work together, and that was the only caveat. There's a degree of that. I mean, someone would clearly sit there and say, I'm not going to do anything Akemann says because I hate his guts, I mean, that guy - obviously, you couldn't trust that person or have any credibility in what they said to you.
q. So, you would not want to put that type of person in the position of special investigator?
A I wouldn't, no.
Q. What about a person who was politically opposed to the State's Attorney? And let me define that for you, a person -- let's say that the State's Attorney's in the middle of a campaign for reelection and the special investigator supports the State's Attorney's opponent and actively supports the opponent and is publicly critical of Akemann, that's not the type of person that the State's Attorney would want in the position of special investigator, correct?
A Again, as a general concept, I don't know that I can disagree with that a lot, but if you look at that in a way that it would actually occur, it's hard to tell because those kinds of things could occur at particular

different times. You know, if a guy walked in who wanted to be an investigator and came in there, and you know, thought Akemann was a
horse's ass from the day he was born and didn't like him at all one bit and I hate his guts and I'd spit on him as he walked by, yeah, I don't want that, that 4 guy can't be, but to say that someone who may 5 disagree with the guy -- because that happened. I 6 mean, I ran against him. You know, I disagree with .7 him completely for the most part, and I could give 8 you examples of other employees who were not
supportive of Akemann in various campaigns and who 10 were not disciplined, and the most I'm talking about 11 is assistants, but in my mind, an assistant is even
of a more -- is of a position which is even more sensitive than even an investigator because they speak for the State's Attorney in court, and in my experience, if we're talking about Akcrnann, because I worked for a lot of these guys. My experience was that there was no -- because you disagree with him politically, he never really had to pay off that way, not to knowledge or to my experience that that happened.

o If I'm hearing you correctly, though, if you
22 had a special investigator who was critical of the State's Attorney in terms of the State's Attorney's competency, honest, integrity, and publicly critical, you would not want that person in the position of special investigator, correct?

A Am I the State's Attorney when you're asking me this question?

o Sure.

MR. DeROSE: Objection. This doesn't give him a full -- .

BY MR. BERSANI:

You understand, right?

MR. DCROSE: Excuse me. Let me make my objection,

counsel. My objection is that it doesn't give the deponent a full hypothetical as to what one
might be publicly opposed to or speaking criticism about, but you may answer. Go ahead, counsel.
THE WITNESS: inherent in this is you have to be able to have a working relationship with somebody that works for you. If you're telling me that there's an employee because of his opinions would make him unable to work with me or I with him, then no, I wouldn't want that person.
BY MR. BERSANI:
Do you know how -- or strike that.
We talked earlier. Mr. DeRose asked
you about Phil Carlson and the fact that you were not 3 involved directly in his hiring, correct? A Correct.
Q Do you know how he came to be hired for the position? Did he apply, in other words, or was he sought for, or any idea?
A I don't have a recollection as I sit here.
Q. Did Akemann tell me something about it at one point?
10 He might have, but I couldn't tell you right now how I I that happened.
Q What about T.R. Smith?
A We were short somebody, and I know Dave knew T.R. as I did and other people did, and he asked my opinion and discussed his qualifications with me one time, and we discussed the possibility of that. I know how that happened. I might have interviewed T.R., too, I might have. I might have interviewed him personally.
Q T.R. Smith was hired after Meg Gorecki announced her candidacy for State's Attorney, 22 correct?
A Oh, God, I couldn't tell you. It sounds
Q And it's a confidential nature?
A Except the other law enforcement bodies or
to name people on the indictment to which you can disclose that stuff to.
Q Other than that, anyone else it's a secret proceeding,

correct?
A Right.
Q So, would it be fair to say that part of their job duties was in assisting the grand jury and being agents of the grand jury was to keep matters confidential other than to those that they're authorized to speak to, correct?
A To say that was part of their job I think is overstating a little bit because their job was totally to do what I told them to do, and I never said make sure and don't tell this to the newspapers because that never was spoken that way. Now, the law is that that would be required, but I wouldn't go as far to say that was a large part of their job.
Q It's required by law, then it's part of their job duty also, correct?
A Well, I guess how I would phrase is the law would require that they don't make that public information. I don't know that I agree that that would be defined as their job duties. It's their 3 responsibility under the law.
Q There's some other entries here in which you're either listed as the attorney or someone else. Can I glean from these what the special investigator was assigned to do?
A No, probably not, because this wouldn't give you that information. The total purpose of this thing was to determine open investigations and where we were on them, what they were doing on them, not the specific job assignments.
Q And would the same go for the typewritten sheet, Exhibit No. 2?
A No. I think that has a little more information on it, because like in the status area, they put locate and serve, locate and serve. That would have been a specific assignment. Some of this other stuff on here is not

quite as clear, but locate and serve clearly is. I see sometimes this says investigate. Now, I don't know what that means, but locate and serve, I do know what that means.
Q But where it says investigate, it would be your belief that that would mean that they were involved in some sort of investigatory function relative to that case, right?
A That would mean -- at least my understanding of how we define those terms at that time, that that would mean it would be something other than scrvir. paper.
Q And then that would mean if that was the case that they would bring information back to the attorney involved?
A Photograph, walk off distances with a distance wheel, find out if they're within a thousand feet of that school. That could be what it was.
Q Witness statements as a result of interviews?
A Could be.
Q Review of records or documents that are pertinent to the investigation possibly?
A When you say that, I would have to take exception to that in this instance because I would never say to an investigator or never had the assistant say, Phil, go get these documents from the bank and give me your conclusion about what they mean. That would never happen. What would happen is, Phil, get me those documents from the bank and bring them to me, or the assistant would ask that they be brought to him. We never had the investigators make decisions about the importance or the non importance about evidence.
Q You could, though? I mean certainly it's within the purview of the statute to assign that type of task to a special investigator, correct?
MR. DeROSE: Objection to the extent that that calls for a

legal conclusion on this witness' part as to what the statute means, but you may answer.
THE WITNESS: in my view of what I did was I could basically ask them anything I wanted, but I didn't.
BY MR. BERSANI:
Q But you could, I mean, based on your understanding of the statute and -
A Well, no. I guess I would say no, because my view of that would be is that that is encroaching on the state attorney's job.. That's encroaching on prosecutorial discretion, and I think that would be wrong.
Q For example, there'.s.items on here that say interview and investigate. You would understand that to mean that they did some sort of interviewing of witnesses or potential witnesses -
A Yeah.
Q -- as part of some investigation they were conducting?
A Right, right.
Q On the last page -
MR. DeROSE: of No. 3?
MR. BERSANI: of No. 3.
Q There's an item there at the top, fourth line from the top, investigate Mary L. Kearns. You recall that investigation, don't you?
A Yeah, I do now, right.
Q That's an investigation where Mr. Carlson was assigned by you to investigate alleged improprieties and expenses and reimbursements in the 20 Coroner's Office?
A What I wanted him to do was -- I think in this particular situation was talk to Bill Keck and Kozynski, and my recollection of this again, and this is without the benefit of documents and several years ago, is that there was some allegations made, and I wanted him to go and talk to them and hear what they

had to say.
Q So, Mr. Carlson brought you back information after speaking to those witnesses, right?
A I don't remember. I remember the investigation, and I remember him -- he and I talking about that at various times. Did I get the Keck and Kozynski interview, I couldn't tell you for sure. if
Q He brought you back an investigatory report, do you remember that, a written investigatory report?
A I'm sure he did.
Q And as a result of that report, you made a decision not to prosecute anyone, correct?
A Correct.
Q So, you relied upon his investigation to 18 make that decision, right?
A I know what you're trying to get me to say here, and I have to say what I did was I reviewed his report, I determined and relied on my interpretation of that report to guide me into prosecution discretion that I was charged with doing. I did rely that he told me what they said and that he gave me an accurate report. Now, did I sit there and say, well, Phil says no, so let's not do it? That's not how that ever worked.
Q Did you ever observe or have knowledge of either Plaintiff performing any political activities on behalf of the State's Attorney during business hours?
A I assume you're talking about Akemann?
Q That's correct.
A I couldn't tell you that I know that.
During the last campaign, Phil was -
Q You can't tell me because you don't want to or you don't remember?
A Let me rephrase that. I don't know what they did all day long. I couldn't tell you what they did all day long. If you're asking if I observed

them or directed them to do some political activities or heard Akemann tell them to do a political activity on the job, my answer to that is no. Q Do you have knowledge of it otherwise? A No.
Q How would you describe the personal relationship between Mr. Carlson and Mr. Akemann?
A They were friends. I mean, other than boss and employee, they were friends.
Q Would you describe their relationship based on your observation and knowledge to be a close personal friendship?
A Yes.
Q They would go to lunch together frequently?
A They went, yeah, frequently. I guess I don't know what that means, but they went to lunch together, right. That was not an unusual thing to happen.
Q Were there ever times during business hours where they would play cards in Mr. Akemann's office?
A Phil Carlson and David Akemann?
Q Yeah.
A I never saw that.
Q Or in any other office? Do you know about it?
A Never heard that before.
Q Do you have knowledge of any activity on behalf of Mr. Carlson or Mr. Smith in terms of asking employees of the State's Attorney Office to contribute towards Mr. Akemann's campaign or walk in a parade or any type of political activity that he would request somebody to participate in? A Well, I guess I'd have to answer that this way: I couldn't tell you that on a particular day they did a particular thing. I'd have to say that during Akemann's campaign people who supported Dave were asked to sell tickets, and people did, and I would assume Phil did, and sometimes we went - someone was going to walk in a parade and if somebody I 1 wanted

to walk with him, I'm sure that that's been brought up at times, maybe to do something in a political campaign sense for the State's Attorney. Whether this was done on company time, I couldn't tell you, I don't know that, but I would have to say that those things were probably done. I think a lot 17 of people did that stuff on behalf of Akemann during 18 some of the political campaigns.
Q And probably Mr. Carlson?
A Again, you're saying probably. I couldn't 21 tell you an incident which I recall, but it's 22 probably true.
Q Did you ever receive an e-mail from Mr. Smith requesting that you contribute or participate in a parade or come to. some function?
A I never did. In fact, we were sensitive to that, especially the last campaign, we were sensitive to that, and one of the reasons why we had a campaign office, a separate campaign office is because we wanted to separate those functions, and I know that myself was very sensitive to that kind of thing, and if I would have ever seen anything like that, I certainly would have responded to it in negatively. iI don't remember ever seeing anything like that.
Q Mr. Akemann, did he have a driver?
A Okay. It always sounds like I'm fencing with you here. There were times when he had someone drive him. During the political campaigns, there were times when he had people drive him, and there were times when he had to drive somewhere that he would have people go with him to drive.
Q Including Mr. Smith and Mr. Carlson, 20 correct?
A I couldn't tell you a time right now, but I think there are times when he had to drive to Springfield or something, and one of those guys went with him to drive. I couldn't tell you the specific incident, but I think that did occur.
Q And those would have occurred during 4 business

hours, to your knowledge?
A I couldn't tell you an incident, but if he had to go to Springfield to testify or to the State's Attorney's meeting and he needed somebody to drive him there for whatever reason he might have, I couldn't tell you a particular incident where that occurred during business hours.
Q What about political functions, do you know if either of these two Plaintiffs would have driven Mr. Akemann to political functions during the day?
A Again, I can't tell you a specific incident. I think during the last campaign -- oh, during the day?
Q Yeah.
A I don't know about during the day. I don't know about that. I know that there were political functions which I know about that occurred in the evening where they might have went along, but I couldn't tell you an incident occurred during the day. I don't know that.
Q In the evening after work, you know them to have accompanied Mr. Akemann to political functions?
A Yeah, as I did at times.
Q Did you know Mr. Smith and Mr. Carlson to work on Mr. Akemann's political campaign this last 6 time around?
A Yes.
Q And would it be fair to say based on your knowledge that Mr. Smith and Mr. Carlson were 10 actively involved in that campaign?
A Yes.
Q Did you know of anyone within the office to 13 keep a calendar in the office during business hours 14 of political functions and events and activities 15 pertaining to Mr. Akemann?
A I know he had a calendar. I mean, most lawyers do. He had some kind of calendar, but a 18 solely political calendar?

Q Right.
A I think he probably did have one.
Q Do you know whether either Plaintiff was involved in keeping a calendar of political events, functions, activities of Mr. Akemann?
A I don't know that.
Q Do you know whether people within the office were assigned to particular events or activities or functions on behalf of Mr. Akemann?
A If someone was a supporter -- and I can only tell what I know. If someone were a supporter of Akemann and they wanted to help, and we'd ask people that, do you want to help Dave? If they didn't, they didn't. If you wanted to support Akemann and you wanted to help, there were things that they could volunteer to do, and if someone said, yeah, I want to help, what do you want me to do, we can say, here's something we need somebody to do, if you want to do that. That happened.
Q So, someone would assign that person if they were willing to help, correct?
A Yeah. If they wanted to know something they could do to help, we could give them something to do. 19
Q You knew that Mr. Smith was involved in assigning individuals who wanted to help to a particular function or event, political functions?
A He wasn't the one in charge of that, if that's what you're asking. I don't know of a specific instance, you know. Mr. Smith was involved in support of Akemann, and did he help organize a neighborhood walk at a period of time? He might have. I don't know that. I mean, I couldn't tell you a specific incident, but for someone who was involved with assigning people to various tasks, I know he wasn't involved in that.
Q He wasn't?
A I guess as a formal job he wasn't, in the campaign.

Q I don't know what you mean by formal job.
A There were people that they had a function in the campaign like organize a neighborhood walk, and that person would say, okay, anybody who wants to walk be here at this time, you can walk Batavia that happened, and I know that that occurred. Neither Smith or Carlson were in charge of that. Now, did they tell somebody to walk in a parade? That may have happened, but not in a formal sense.
Q When we talk about someone, let's forget about that term. I'm talking about people in the office. I'm talking about assistants and employees of the office. Did you know Mr. Smith or Mr. Carlson to be involved directly in assigning people in the office to particular functions on behalf of Mr. Akemann?
A I don't know a specific incident.
Q Do you know generally that he did that?
A I know generally that people who were involved in supporting Akemann in the campaign helped 8 in various ways, and that could have happened.
Q Do you know generally that Mr. Smith or Mr. Carlson or both were involved -
A I would assume that by being actively involved in the campaign that they might have done 13 something like that. If you're asking a specific 14 time that I recall, I don't recall that. 15 Q But you know generally that they were 16 involved in assigning people from the State's 17 Attorney's office to political functions, correct?
A In a limited way, I'd answer, yes.
Q Are you familiar with a service called 20 Auto Track?
A It doesn't ring a bell.
Q It's a computer or a service that the 23 State's Attorney Office used under Mr. Akemann's tenure as an investigatory tool?
A Okay. I remember that.

Q Did, yourself, ever use that service?
A I was aware of it. I don't recall ever personally using it. I might have asked them to run some license numbers or something. I might have done 7 that.
Q Asked who?
A One the investigators.
Q And would it be accurate to say that access i i to that type of service was restricted within the 12 office?
A I think you had to know how to get into the web site and stuff. You might have -- even have had the password or something. I didn't have that. I 16 couldn't get in myself.
Q Do you know what protocol existed in terms of -
A No, I don't.
Q In terms of who had access?
A Well, I guess I'd have to say this: If an assistant wanted to -- like you're doing an unlawful possession of stolen motor vehicle case and you want to get the title history or something, the assistantwould have to ask me to get that and assign them todo that for them.
Q Was there any type of prohibition on the useof that particular service?
A From Akemann?
Q Yes, from Akemann on down.
A I never was involved in any policy decisionon that. I know that Akemann's policy on that wasyou only use it for work purposes.
Q Not for personal purposes, right?
A Right.
Q Not for political purposes, right?A Right.
Q Do you know who Dr. Lynn Siete is?
A Yeah.
Q Who is Lynn Siete?
A She's the wife of Cip Siete.

Q And did you know her to have a role inMiss Gorecki's campaign?
A Yes.
Q What washer role?
A I don't know exactly.
Q Campaign manager, is that -
A I didn't know that.
Q Do you know of any instance where the AutoTrack service was used to investigate Linda Siete?
A No.
Q Was there any investigation -- being the person in charge of these investigations, was there any investigation that you recall into Miss Siete of any kind?
A No.
Q So, if someone from the office used AutoTrack to investigate Miss Siete, that would be a violation of Mr. Akemann's policy, correct?
A Unless they were investigating a crime.
Q Right, but you don't have knowledge of that?
A I don't have knowledge of that.
Q Do you know of either Mr. Carlson or Mr. Smith using AutoTrack to investigate Linda Siete?
A No.
Q You never heard of that before?
A No.
Q Have you ever seen documentation to that effect?A No.(Exh. No. 4 identified.)BY MR. BERSANI:Q I'll show you what I've marked as ExhibitNo. 4.
A You know what? I think I was sent this.
Q Hang on one second. We're not as quick asyou are.
A I'm sorry.
Q Okay. Exhibit No. 5, do you recognize thisdocument?MR. DCROSE: No. 5 or 4?THE WITNESS: Mine says 4.MR. BERSANI: I'm sorry, 4. 1 apologize.THE

WITNESS: No, I don't recognize thisparticular document. I can tell what it is fromreading it.BY MR. BERSANI:
Q Why don't you tell us what it is?
A Well, it looks to be some type of computerprintout.
Q You began to say that you were sent this.
A.Yeah. I think Mr. DeRose -- I don't knowwho sent it to me, to tell you the truth. I think I
received it in my office sometime back, and before we came down here, I think I was shown this. I didn't know it was for Linda Sicte. Somebody said it was for Cip Siete. I didn't know it was Linda Siete.
Q Who's Cip Siete?
A Her husband.
Q Let me back up then just so I'm clear on something. Cip Siete, do you know of any investigation into him during your tenure with the State's Attorney's office?
A No, no criminal investigation, no.
Q Any other type of investigation?
A You know, I'm wondering if somebody might have said something about him one time. It's not out of the question to say that there might have been some inquiry about him at some point in time.
Q When you say years ago, you're not talking about during the time period of the last campaign for State's Attorney involving Gorecki and Akcmann, right?
A in 2000?
Q Right.
A No, I don't recall anything during that time. It would have been before that.
Q You started to say that you saw this,Mr. DeRose sent this document to you, No. 4?
A Yeah.
Q Does it refresh your recollection at all asto some sort of search or investigation into LindaSiete?A No. I don't know

that I've ever seen thisbefore it came to my office or today.(Exh. No. 5 identified.)BY MR. BERSANI:
Q I'm going to hand you Deposition ExhibitNo. 5, if you could review that, please. Are youfamiliar with this document?
A I recognize what it is. I don't reallyremember it, to tell you the truth.
Q What do you recognize it to be?
A Well, just from reading it, it looks like amemo from Drew Sosnowski about raises and how toevaluate people for raises.
Q Any idea how this came to be?
A I think he made it up.
Q Was he asked to do that?
A I don't remember that. At the end of each year, the chiefs were asked to give recommendations for raises for people that worked under them.
Q And this is a memo to you, correct?
A Right.
Q November 4, 1999. It says, I have developed the following scale for review. If this does not meet with your approval, let me know, and I'll change it. Did you approve this scale?
A No, I don't think we ever did that.
Q Do you know of any evaluations that were done for this scale?
A Not using the scale, no.
Q Not at all?
A Not that I remember, no. He might have done it that way, but that wasn't the way I requested it.
Q And so, are you saying that you did not approve this scale for your use?
A I guess what I'm saying is that might have -- I asked every chief to give me recommendations, that was done yearly, and they had different ways of ever doing it, and then; was some

form we used, but there are other ways of doing it, too, and I was not picky on how they wanted to do it, but I needed to get some kind of idea from them what they thought about the various employees when it came to raise time, and this looks to me like something Drew did in order to satisfy that requirement. This was not the system that was in place for everybody in the office.
Q Do you recall having any discussions with Drew about this system?
A I'm sure we did because it's addressed to me, and this is the kind of thing he would talk to me about.
Q In the scale, it talks about productivity, loyalty, follows directions, to easy to supervise, and big picture. Do you have any knowledge of what loyalty meant within the purview of this scale?
A You'd have to ask Drew. I mean, you know, I think -- the only thing I can tell you is I don't know how he defined that. I don't know what he meant by that.
Q What about big picture, what does that mean? Do you know?
A That's a phrase that used to be bandied about, people that were more amenable to -- sometimes you had to move people to places they didn't want to go or send people to jobs or do functions which they didn't like to do, and that was a shorthand way of saying they were cooperative and followed any -- were easy to work with and things like that. That's the way 1 interpreted it. Again, his direct definition, I couldn't tell you.
Q When you say functions that they didn't want to do, what do you mean by that?
A Well, you'd have to have people do stuff. 1 mean, some people had to do things. Some people had to work the felony review over Christmas or New Year's Eve, and no one likes to do that kind of stuff. Sometimes people had to

work at what they called election detail. Around election day, you had to drive around to all the election polling places. No one liked to do that either.
Q Why was that necessary?
A Well, we're responsible for prosecuting people who violate the election code, and if you put
a sign up within a hundred feet of a polling place, that's a violation. Inevitably, there would be a fist fight someplace about this every year, and we had assistants ready to respond to problems that the precinct captains had.
Q. It's your testimony that you did not use
this scale to evaluate your employees, or you know, the people within your supervision?
A Well, I supervised the chiefs.
Okay.
A Okay. I supervised the chiefs. There was a level of command in there. Assistants reported to the chiefs; the chiefs reported to me.
Q. Who evaluated the investigators?
A Me.
Q. And would there be written evaluations in their personnel files?
A I don't know. I did some written
evaluations of people. 1 don't know -- when I became First Assistant, I don't know that I did it written for the chiefs and investigators. I could be wrong. I don't recall doing them. I don't know.
It's possible that you didn't do anyevaluation of investigators, is that your testimony?
A No, I did, because every year we -- you
know, that's how we decided raises. If someone said this person is bad, I don't like them, and they could support that with something, then chances are they might not get the raise they want.
Q But there might not be anything written in 8 terms of investigator?

A Might not be, right.
Q Of a special investigator?
A Right.
MR. BERSANI: Why don't we take a short break. You probably have questions, I'm sure, John.
(Short recess taken.)
BY MR. BERSANI:
Q Did you ever organize a meeting of all State's Attorney employees, office employees at the judicial center, to drum up support for David Akemann's reelection?
A Not in the last -- I think it was the campaign before that, like lunchtime or something or after work it might have been, 4:30, something like that.
Q. What was the purpose of the meeting? A To drum up support for Akemann.
Q. Ask for volunteers?
A Right.
Q. Do you think it was at lunchtime?
A It wasn't during working hours. I think it was like 4:30. 1 remember specifically because I remember a flyer, and that was a concern about us not to do anything political during work hours.
Q. Do you recall a time period in which Phil Carlson was on disability?
A Yeah.
Q. Do you know what his activities were while he was on disability?
A He was working in the campaign office.
Q. Did you ever observe any county cars at the campaign office?
A I never did, no.
Q. How about any other -- strike that.
A Well, you know, I don't think Akemann was driving a county car at that time during the campaign, I don't think that happened, but I think

there might have been a time when an investigator had to stop by there to talk to somebody, and there might have been an investigator car there, might have been.
Q. During work hours?
A And they were working. They weren't campaigning. Akemann sometimes would be over there, and they may want to talk to him about something, and they would stop there.
Q Anything specific that you remember?
A No, I don't remember anything specific about it, no, but I know that that happened.
Q Your wife was Akemann's secretary, right? 12
A Right.
Q Personal secretary?
A Right.
Q During the entire eight years that he was 16 State's Attorney?
A No, no.
Q For what period of time?
A I couldn't tell you. It wasn't the entire 20 eight years; maybe half of that.
. The last half?
A Yeah. Well, she left in June of 2000.
Q Okay. As I understand it, at the end of Mr. Akemann's term, you know, last term, in order to get an appointment, if you were like an Assistant State's Attorney or someone else in the office, in order to get an appointment with him, you had to set it up through his secretary, your wife, correct?
A Right.
Q. But as I understand it, Mr. Carlson or Mr. Smith didn't need to do that, correct?
A I don't know that. I don't know what they needed to do or not, but everybody that walked in, I mean, it would be wrong to say that you had -- Dawn stopped anybody from going in there that didn't have an appointment because

that's just not true.
Q. You knew Mr. Carlson and Mr. Smith to just walk in without an appointment and walk into 1Mr. Akemann's office, correct?
A I could tell you that about a hundred 18 people.
Q Okay, but as to them, they had free access to his office?
A I wouldn't say that. I mean, they would just walk in the door when the door was closed? That wouldn't happen.
Q.They'd knock on the door and go in?
A They might knock on the door, as I said, a 3 lot of other people.
Q Like who?
A All the chiefs would do that and regular assistants. There were times when there was no secretary out there and they would knock on the door and say, you got a minute, that happened, by almost anybody. There was a procedure. If they wanted to make an appointment to talk to Dave and they wanted 11 to meet with Dave, that he had them make an appointment with Dawn so he could be there or wanted to be prepared for what they wanted to talk about and they made an appointment, but to take the blank statement that no one got in unless they got an appointment is wrong, and to say that guys just walked in without any kind of preamble, that's not true either.
Q Well, you knew that as a procedure people needed an appointment, and that's how procedurally it should work, but except for these two, Smith and 22 Carlson, they didn't need to go through that procedure to get an appointment, did they?
MR. DCROSE: Objection, that's asked and answered.
THE WITNESS: Well, I would say that's not true.
BY MR. BERSANI:
·Did you ever observe -- did you ever receive

any group c-mails from Mr. Carlson regarding the Akemann campaign at work?
A Not that I remember. I don't know.
How about from Mr. Smith, did you ever receive any group e-mails, and by that, I mean directed to all the employees about some function or campaign?
A Not that I remember.
Q. Did you have discussions with Mr. DeRose prior to today about this deposition? A Yeah.
Q. Did he ask you questions about what you knew or didn't know, kind of like what we did here today? A Abbreviated, yeah.
Q. Did you have any discussions or contact with either Mr. Smith or Mr. Carlson?
A Last time I saw Smith I think was at the Republican convention, which is a county thing after primary, and Phil calls me once in a while, and I talked to him last week, but really what he called me about is to say when we're going to do this. I haven't seen Phil socially -- or I mean outside of that, since we left.
Q. Have you had conversations with either Mr. Smith or Mr. Carlson about their lawsuit or about what testimony you may provide today?
A We talked about their lawsuit. I don't know much about it, just very general terms, and no, they never asked me about: what about this, what about this? That never happened. We might have discussed stuff about the testimony that may be relevant to their suit, but it wasn't like a question-and-answer period.
Q. Flow many times did you do that before today? A Today?
Q, Today you spoke to them?
A They were up in the office with Mr. DeRose.
Q, So, today, before the deposition today, you talked with them and Mr. DcRosc about what testimony

you may provide here today, correct?
A I was asked questions and asked to respond to certain things, and I did that.
Q And you and I have never spoke about those 3 things, have we?
A No.
Q You said that during Mr. Carlson's disability you saw him at the campaign office. Did you understand him to be on paid disability?
A You know, I don't know how that ended up working out. I think he didn't want to go -- I don't know how that worked out. I don't know that, no. I would be completely speculating on what that deal was.
Q Whether it was paid or not paid?
A Right, I really couldn't tell you.
Q Did you find it unusual that during the day he'd be at the campaign headquarters for Mr. Akemann 17 while he was on disability from county time?
MR. DeROSE: objection. That calls for a 19 conclusion on the witness' part as to what is unusual 20 or not unusual, but you may answer.
THE WITNESS: what Phil did over there was sit down and answer the phones, and sometimes he couldn't 23 even do that. Sometimes he was in physically bad shape and couldn't do that. Many times -- I would say the bulk of the time he was there he would sit there, and as people came in, he'd talk to them and periodically answer the phone or take down a sign location, and it was very, very, very mundane jobs that he did over there, and there were times when I would go over there at times and I would think Phil8 should be home in bed, that he was that physically in bad shape, and people would say that to him, and sometimes he went home to bed; other times he was better and he could talk on the phone and stuff, but that's all he did.
MR. BERSANI: Okay. Thank you.

MR. DeROSE: Just a very just -- let me take just 15 a couple minutes.
REDIRECT-EXAMINATION
BY: MR. DCROSE
Q You tell counsel that as investigators of your office there were times when Mr. Carlson and Mr. Smith were also considered agents of the grand jury for the special grand jury investigations you were doing, correct?
A Right.
Q And when you were considering them to be agents of the grand jury, you expected them to keep all grand jury information confidential, correct?
A Correct.
Q And in your experience, did they, in your experience, always keep the information that they were gathering for the grand jury confidential?
A To my knowledge.
Q And you tell us that their job, as you
io perceived it, was to do what you told them to do, is that correct?
A Yeah.
Q In your experience, did Mr. Carlson do the job which you expected of him, which was to do what you told him to do?
A Yes.
Q Did Mr. Smith in your experience do the job you expected of him, which was to do what you told him to do?
A Correct.
Q You say that you do know of situations where Mr. Carlson and Mr. Smith may have been involved in political functions during the evening for Mr. Akemann, is that correct?
A Yes.
Q And you said you did the same kinds of things, correct?

A Right.
Q Did the evening political functions that you did or that you observed them doing in any way interfere with the ability of Mr. Carlson and
Mr. Smith to do the job requirements they had as investigators and you had as an Assistant State's Attorney for the office of Kane County State's Attorney?
A I think Phil was on leave from like November until after the election. I don't think he was there during the bulk of that time. I never saw it compromise anything that T.R. did.
MR. DCROSE: I have nothing further, counsel. Anything further?
MR. BERSANI: No, no.
MR. DCROSE: Signatures can be reserved if you want to read this transcript to make sure that the
court reporter took down everything what you said, or they may be waived if you want to trust that she tookdown accurately what you said. You did speak a little fast, but I will tell you that she is a competent court reporter who usually -- I shouldn't say usually -- who I have never known to make mistakes, but that's your call.
THE WITNESS: I'll waive. I'll trust her. MR. DeROSE: Signatures are waived.

(Further deponent saith naught)

FEDERAL RULE OF CIVIL PROCEDURE
RULE 20 (f) (1) CERTIFICATE

I, JEAN M. HINCKS. , a Notary Public in and for the County of Cook and State of Illinois, and a Certified Shorthand R,.porter of said state, do hereby certify that on. to wit, the 11th, July. 2002, personally appeared before me at 15 Spinning Wheel Road, Hinsdale, Illinois, JOHN BARSANTI produced as a witness in said cause. 13

I further certify that said witness, JOHN BARSANTI was by me first duly sworn to testify the truth, whole truth, and nothing but the truth in the cause aforesaid before the taking of the deposition; that the foregoing deposition was recorded stenographically by me and was reduced to computerized transcript under my direction, and that the foregoing is a true and correct record of the testimony given by said witness.

I further certify that review of the 23 transcript by the witness was not requested by the witness or by a party before completion of the deposition.

I further certify that I am not a relative or employee of attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

I further certify that my certificate annexed hereto applies to the original transcript and copies thereof, signed and certified by me only. I assume no responsibility for the accuracy of any reproduced copies not made under my control or direction.

/s/ Jean M. Hincks, CSR

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Phillip D. Carlson and Thomas Smith *Plaintiffs* ,	)	
v.	)	No. 01 C 9235
Mary E. Gorecki, individually, and as State's Attorney of Kane County, Illinois, and Kane County, Illinois, a body Politic, *Defendants.*	)	

THE DEPOSITION OF DAVID AKEKANN, called by Plaintiff, for enacination, taken pursuant to the Federal Rules of Civil Procedure of the United States District courts pertaining to the taking of depositions, taken before JEAN M. HINCKS, a Notary Public and Certified Shorthand Reporter within and for the County of Cook and State of Illinois, taken at 15 Spinning Wheel Road, Hinsdale, Illinois, on the 11th day of July, A.D. 2002, at 4:40 P.M.

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PRESENT:

THE LAW OFFICES OF JOHN P. DeROSE L ASSOCIATES
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On behalf of the Defendant,
Mary E. Gorecki, State's Attorney of Kane County;

ALSO PRESENT:

KANE COUNTY STATE'S ATTORNEY'S OFFICE:

MS. MEG GORECKI,
State's Attorney;

MS. M. KATHERINE KORAN
Assistant State's Attorney;

MR. ALLAN R. STASICA
Assistant State's Attorney;

AND

MS. SHARON LAW LARSEN
Attorney-at-Law

(Witness sworn.)
DAVID AKEMANN,
called as a witness herein by the Plaintiffs, having been first duly sworn, was examined and testified as follows:
DIRECT-EXAMINATION
BY: MR. DeROSE
Q Sir, will you please state your name for the record?
A David Akemann.
Q Spell your last name.
A A-K-E-M-A-N-N.
Q Mr. Akemann, have you ever given a 14 deposition before in your life?
A Yes.
Q I don't know if that was under the state 17 system or the federal system.

A Both.
Q Then I'll kind of short-circuit this.
This deposition will be taken according
to all the applicable rules of the Federal District
Court for the Northern of Illinois, the appropriate
rules of the Seventh Circuit Court of Appeals, and of
the United States Supreme Court that apply to the
taking of depositions.
To make sure that those rules arc followed, counsel fron)
time to time may interject with an objection. If you hear
counsel start to speak in any fashion, if you could please
just stop talking until he and I could discuss on the record
the particular question that's on the table and its efficacy
under those rules that we're talking about, and we would
appreciate that.
We don't want you to guess at anything.
We will not make this a trial by ordeal. If the deposition
goes any extended length of time, we will take a recess. If
we have not taken a recess soon enough to accommodate
your needs for comfort, if for no other reasons, if you
would just tell us you need a few moments, we'll be happy
to interrupt and give you an opportunity to refresh
yourself.
The court reporter, of course, with
that machine needs verbal answers to every question, not
just a nod of the head.
Mr. Akemann, are you employed at this
time?
A Yes.
Q By whom are you employed?
A Jim Ryan.
Q And that's the Attorney General of the State
of Illinois?
A Yeah.
Q And do you have a specific title with .
Mr. Ryan's office?

A Assistant Attorney General. My current assignment is the Executive Director of the Gang Crime Prevention Center.
Q And your offices, I take it, are downtown?
A Yes, Chicago.
Q Mr. Akemann, we brought you here on a deposition concerning a period of time when you were holding an elective office of your own in Kane County. Have you held more than one elective office
A Yes.
Q How many different elective offices have you held?
A Three.
What was the first elective office you ever held?
A Precinct committeeman, Republican precinct committeeman.
Q. Where was that?
A Elgin Township, Kane County, Illinois.
Q. Do you still hold that particular position?
A No.
After holding that particular position, what was your next elected position?
A I was Kane County State's Attorney.
Q. We're going to get into that one. You say there was a third position you held as an elective office; what was that?
A A member of the Board of Governors of the Illinois Appellate Prosecutors.
Q. Do you still hold the position on the Board of Governors of the Appellate Prosecutor's Office?
A No.
Q. Now, the Kane County State's Attorney's Office that you held, what was the period of time you held it?
A December 1, 1992 through November 30, 2000.
So, I take it you were reelected to that

position and held it for two terms?
A Yes.
Q And we have just completed the deposition of John Barsani, who was a member of the Kane County State's Attorney's Office. He was a member of the office during your two terms, is that correct?
A Yes.
Q Did he ever, as you remember it, actually run for election to that office at the same time you were seeking it?
A Yes, he did.
Q In which year?
A We sought the Republican nomination for that office in 1992, along with two others.
Q Do you remember the names of the two other persons who ran for that office against you and Mr. Barsanti?
A In 1992, that would have been Patrick Jaeger and John or Jack Cunningham.
Q How does Mr. Jaeger spell his name?
A My best guess would be J-A-E-G-E-R.
Q Now, after you successfully won the campaign for Kane County State's Attorney in 1992, did you fire any Assistant State's Attorneys who were already in the office from a prior administration?
A You mean -
Q Terminate their employment.
A When I came into office you mean?
Q Yes.
A No.
Q When you came into office, what position did John Barsanti hold in the office?
A Under my predecessor, Gary Johnson, I believe he was the First Assistant State's Attorney.
Q That would have put him the No. 2 man in the office?

A Yes. When I took office, he was the chief of the Criminal Division. When I first started, I did not have a First Assistant.
Q Was that your choice not to have that position available in your office, a First Assistant?
A At that time, yes.
Q The job duties and functions that you assigned to Mr. Barsanti as your chief of the Criminal Division, did they differ at all from the job responsibilities he had had as a First Assistant under Gary Johnson, as far as you knew?
A I can't answer that. I don't know what responsibilities he had under Gary's administration.
Q If he was the chief of your Criminal Division, I would suspect you had a chief of your Civil Division also?
A Yes.
Q Who was that Assistant State's Attorney?
A That initially was Patrick Jaeger.
Q That was another Assistant State's Attorney who had campaigned against you for the 1992 position is that correct?
A Yes.
Q Did Mr. Jaeger remain on as chief of the Civil Division after you ascended office?
A He did for a period of time. I can't recall how long.
Q And then at some point, he left the office or got a different position?
A He left in a sense, but he remained a I special assistant and did work for the highway department, if I recall correctly.
Q And would that be throughout the term that you were State's Attorney of Kane County that he remained as a special Assistant State's Attorney?
A For a considerable period. It would have been for

probably, as a guess, three quarters of the time, is my guess.
Q.As chief of the Criminal Division, was John Barsanti the highest-ranking Assistant State's Attorney in your Criminal Division?
A Yes.
Q. And is it fair to say that you relied upon him to direct the other Assistant State's Attorneys in the Criminal Division in your absence and with your approval?
A Yes.
o Did there come a time when you reestablished the position of First Assistant State's Attorney?
A Yes.
· Do you remember when that was?
A It was after the beginning of my second ten-n. I don't recall an exact time.
o And when you reestablished the position of First Assistant State's Attorney, who did you assign to that position?
A John Barsanti.
Q. Then he would have been the No. 2 person in the office over the entire office?
A Yes.
Q. At any time while you were State's Attorney, did you ever make political allegiance a requirement of any Assistant State's Attorney who served in your office?
A Political allegiance to like a Republican party or something?
· To the Republican party.
A No.
Q. Did you ever make the requirement that in order for one to be an Assistant State's Attorney in your office they had to have voted for you?
A No.
Q. I would take it when Mr. Barsanti was seeking the position of State's Attorney -- of Kane County

State's Attorney in 1992 and Mr. Jaeger were seeking the position of State's Attorney in 1992, you did perceive that those two men were not supportive of your candidacy at that time?
A No.
Q Did you ever tell either of them after youwon the nomination from your party that their jobswere going to be in jeopardy?
A No.
Q Did you ever in your mind make the decisionthat their jobs were in jeopardy?
A Well, what was in my mind 10 years ago itwould be difficult to verbalize now, but I have no memory of that.
Q Now, in order to be an employee, a civilian employee, such as a clerk or a secretary or annadministrator in the Kane County State's Attorney'soffice while you were the Kane County State'sAttorney, was there a requirement that any of those employees be members of the same party as you were?
A No.
Q I take it you are a Republican, is that correct?A Yes.
Q And your candidacies have always been supported by the Republican party in Kane County?
A That's an interesting political debate.
Q I mean, those that you have run, you've run under the Republican party?
A Yes. Each time I've been in the general election, it's been as a Republican nominee.
Q Do you know whether there are any employees in the Kane County State's Attorney's Office while you were the Kane County State's Attorney who were Democrats as opposed to Republicans?
A Could you repeat that?
Q Do you know if any of the employees, the civilian employees in the Kane County State's Attorney's Office, were Democrats during the period

of time you were Kane County State's Attorney?
A How would you define civilian employees?
Q Clerks, secretaries, administrative personnel.
A I don't really know what party affiliation might have been with the clerks, or I mean, you could surmise, but it's not a question I ever asked any of the employees, clerks, civilian employees.
Q So, you never inquired of civilian employees what is your political persuasions, whether Republican or Democrat?
A That is correct.
Q Now, the investigators in the Kane CountyState's Attorney Office, were they all already inplace before you became Kane County State's Attorney or were some of them hired after you became State'sAttorney?
A I had occasion to appoint specialinvestigators while in office.
Q How many did you appoint?
A I would say probably eight or nine. That's a close estimate.
Q Without holding you to a recollection of alltheir names, could you name as many of theinvestigators you remember hiring while you were theState's Attorney of Kane County?
A Well, the two Plaintiffs in your case.
Q That would be Thomas R. Smith?
A Phillip Carlson and T.R. Smith, David Berg. MR. BERSANI: That's Berg or Burke? THE WITNESS: Berg.BY MR. DeROSE:
Q How do you spell it?
A My recollection was B-E-R-G.Q Okay.
A. Jim Kintz.
Q Can you spell Mr. Kintz' last name?
A As a guess recollection, it would be K-I-N-Z.

Q All right.
A Richard Johnson. Appointed but were not directly employed by me would be Tim Bosshardt.
Q Could you spell Mr. Bosshardt's last name?
A Again, it would only be a guess, B-O-S-S-H-A-R-D-T, something like that.
Q All right.
A His last name was Kilborn. I'm not sure what his first name is, maybe Michael. My recollection is fuzzy on the first name. I can't recall. David Moore, and Judy Burscheid might also be in that category, I'm not exactly certain about Judy. She was an Aurora officer.
Q Could you spell Miss Burscheid's last name, take a stab at it?
A B-U-R-S-C-H-E-I-D. She worked at worked at the Advocacy Center.
Q You indicated on these last three or four persons that you may have appointed them, but they didn't work directly for you.. Are you talking about funding purposes?
A They were employed by other agencies. Actually, David Moore eventually was paid by the office, but when he was- first appointed, he was a Sheriffs deputy.
Q Finally, when he was appointed to work as a special investigator in the State's Attorney's Office, you were the one who appointed him?
A Yes.
Q You are aware that Mr. Moore is a Democrat?
A Yes.
Q He's been appointed to an office in Kane County of coroner?
A Yes.
Q In order to be appointed these positions of special investigator by you, did you ever require of

any of the persons you appointed to that position that they be Republicans?
A No.
Q Did you ever require of them that they vote for particular persons or candidates in any elections?
A No.
Q. Did their political affiliations and beliefs have any impact at all upon your decision to make them special investigators?
A Say that last one again, please?
Q. Did their political support or affiliation with any party or particular candidates have any bearing on your decision as to whether or not you would appoint them special investigators?
A I don't think so. In the case of the Plaintiffs, I certainly knew them, knew of activities they did from political activities. I'm certainly aware they did them.
Q. Now, in your office as you ran it for Kane County, did your special investigators have any input into the policy-making decisions of your office?
A No.
Q. Who established policy for the Kane County State's Attorney's Office during your regime? A Ultimately, I did.
Q. Did you have any other confidants who worked closely with you in determining what policy ought to
A That would be the division heads.
Q And how many different divisions did you have in the office during your regime?
A That varied somewhat over time. Prior to tj a First Assistant position, it would have been criminal, civil, later the Child Advocacy Center, and administration.
Q So, there would have been four at the time before you had a First Assistant State's Attorney,

correct?
A And juvenile also.
Q So, there would have been five then?
A Yes.
Q When you finally established the position again of First Assistant State's Attorney, did you then at that same time appoint a new chief of the Criminal Division or was the chief of the Criminal Division assumed by Mr. Barsanti in the First Assistant?
A There was a new chief of the Criminal Division. Following the shift of the First Assistant,, there would have been three division chiefs: criminal, civil and family justice.
A. Actually, you had one less division when you established the First Assistant State's Attorney's position?
A Yes.
Q. Did you require of any of the chiefs of your division that they have a particular political support or orientation in their political activities?
A You mean as to a party?
Yes.
A No. Certainly, they were supportive of me, but -
Q. Now, with respect to Phil Carlson and Thomas Smith, did you ever require of them any kind of -strike that. The job assignments that your investigators got on a daily basis in the course of the work they did for Kane County State's Attorney's Office, who would give them those assignments?
A Under the second -- when I had a First Assistant, it would generally be the First Assistant.
o And before you had the first assistant, if the special investigators got a job assignment, who would give them to them?
A Probably myself or a division chief.
Q. So, once you put Mr. Barsanti in as First Assistant, you

had him do all of the assignments for special investigators?
A yes, that was one of the reasons for the change.
Do you know -- strike that.
Were your investigators ever allowed to make any kind of policy decisions that you are aware of for your office?
A No.
Q. Was that by decision on your part that they would not be allowed to do that or was that just the policy or the procedure that was followed even before you got there, as far as you know?
A I'm not exactly certain what was there before I got there. I know that investigators during my tenure made policy for the office. Policy discussions were with chiefs' meetings, consisted of the division chiefs and myself.
Q. And you made that clear to all your division chiefs that the policy decision will be made by us and only us?

A Well, eventually by me, yeah.
Q. So, any policy that came out from the office, it had your imprimatur on it? It was something that you had ultimate
A I think the major ones. Each division had, I'm sure, things they did and supervised in their divisions. I can't say that I saw everything. It would have been a division chief that' would have made those kinds of things.
Q. The kinds of job responsibilities that your special investigators received from the various division chiefs and then finally from the First Assistant, were any of those job responsibilities, to your knowledge, ever dependent upon the political affiliation of those special investigators?
A Could you repeat that, sir?
Q. The job responsibilities and assignments that the division chiefs and the First Assistants gave to

the special investigators, were any of those job assignments dependent upon what political party any of the investigators happened to be members of?
A No.
Q Did you ever receive any complaints that Mr. Moore, who was a Democrat, failed to do a particular job because of his political affiliation in the community?
A None that I recall.
Q Were you ever advised that Mr. Carlson or Mr. Smith refused any job responsibility or assignment that they were given because of their political beliefs or affiliations?
A Did they refuse a job assignment because of their political affiliations? I don't know that either of them ever refused a job assignment.
Q. And if they had so -- if their political beliefs had interfered with the job responsibilities that were being assigned to them by the hierarchy of your staff, you would have wanted to know that, is that correct?
A Sure.
Q. Has political affiliation ever entered into any decisions you made while you were State's Attorney of Kane County in determining either the suitability for employment of a particular individual or for retention of employment of a particular individual?
Mr. Moore, who was a Democrat, failed to do a particular job because of his political affiliation in the community?
A None that I recall.
Q Were you ever advised that Mr. Carlson or Mr. Smith refused any job responsibility or assignment that they were given because of their political beliefs or affiliations?
A Did they refuse a job assignment because of their political affiliations? I don't know that either of them ever refused a job assignment.

Q. And if they had so -- if their political beliefs had interfered with the job responsibilities that were being assigned to them by the hierarchy of your staff, you would have wanted to know that, is that correct?
A Sure.
Q. Has political affiliation ever entered into any decisions you made while you were State's Attorney of Kane County in determining either the suitability for employment of a particular individual or for retention of employment of a particular individual?
A I don't believe so. Obviously, as I said before, I've known one or more employees because of my past experience that have been involved and certainly was aware of it. Was that controlling? No.
Q. You are aware that Mr. Carlson and Mr. Smith supported your candidacy for office of State's Attorney, is that correct?
A Yes.
Q. If they had not supported your candidacy, were you prepared to terminate their employment?
A I don't know. I never really -
Did you allow -
MR. BERSANI: Wait.
question?
THE WITNESS: I don't know that I ever contemplated that. Was I prepared to -- you mean did I ever tell them, If you don't do this, I'll fire you? No, I never had that discussion. BY MR. DeROSE:
Q. Did you ever discipline or terminate any employee of the Kane County State's Attorney's Office for failure to support your candidacy?
while they were employees of your office
your own personal observations and getting
back from the division chiefs and First
Assistant, did you perceive that Mr. Carlson and

Mr. Smith were performing the job functions expected of them as special investigators to the Kane County tale's Attorney's Office?
A. yes, That would absent the time of Mr. Carlson's illness.
Q There was a period of time when he was ill?
A He had a stroke.
Q And that because of the illness, that was an excused absence.
A Yes.
Q You are aware that both Mr. Carlson and Mr. Smith were involved in political activities from time to time while being members of your staff, is that correct?
A Yes.
Q Was there any policy that you had in your office about not doing political work during normal business hours?
A Yes.
Q What was that policy, as best you remember it?
A It was doing campaign work while you're on office time was prohibited.
Q And to your knowledge, did Mr. Carlson or Mr. Smith ever violate that policy?
A Not to my knowledge.
Q And if they had, you would not have approved of it and would have corrected it, is that correct?
A That's correct.
Q If Mr. Carlson or Mr. Smith disagreed with some activity done by other members of your staff, you would not discipline them for that for merely having that disagreement provided they did the work that was expected of them?
A Yes.
Q Did you bear from time to time that

Mr. Carlson and Mr. Smith found fault with the activities that they believed had been done by your campaign adversary, Miss Gorecki?
A Say that one again, please?
Q Did you learn in the course of your discussions with either of them that either Mr. Smith or Mr. Carlson had found fault with some activities of Miss Gorecki which they believed or had learned had occurred during the time that she was your campaign adversary?
A Yes.
Q And did you prohibit them from voicing any personal opinions they might have had about Miss Gorecki's activities that they found to be objectionable?
A I don't recall doing that, no.
Q Are there many employees of the Kane County State's Attorney's Office who are active in politics in the community, in the Kane County community, as far as you perceive it?
A I wouldn't have any idea at the present time.
Q When you were there, were there many persons who were in the employ of the Kane County State's Attorney's Office who you did perceive were active in politics?
A There were some, yeah, that were.
Q And some persons were more active than others, in your opinion?A Obviously, yes.
Q Did the activities of those persons no matter which party and candidates they happened to support in any way impact your decision to keep those persons in the employ of Kane County State's Attorney?
A No.
Q And the only policy was if you're going to be involved in politics you must do it on your own time and off from business hours?
A It was written -- I don't know what the

exact words, but the essence was you do it on your own time and your own place.
Q There was a written policy also?
A Yes.
Q Was it a written policy that had been put in place by you or was it on the books even before you got there?
A I know it was by me. I don't know what exactly it was before I got there.
Q Can you describe your own opinion the loyalty of Mr. Carlson to doing the jobs that are expected of a special investigator for the Kane County State's Attorney's Office as you observed them?
A To my knowledge, he did what was assigned to him by whoever assigned it to him as a special investigator.
Q Can you voice your opinion as to whether or not Mr. Thomas R. Smith showed loyalty in the performance of his duties as a special investigator for the Kane County State's Attorney's Office during the period of time he was employed by the office?
A To my knowledge, he did and that he carried out the duties that were assigned.
Q And at any time during the period of time that they worked under your regime, did you ever consider terminating them for any reason, either one of those two gentlemen?
A No.
MR. DeROSE: Thank you, sir. You may inquire. MR. BERSANI: Thanks.
DIRECT-EXAMINATION
BY: MR. BERSANI
Q Mr. Akemann, as you probably guessed, I represent Defendant, Meg Gorecki, in this lawsuit. 5 My name's Mike Bersani.
How long have you known Phil Carlson?
A Approximately 20 years now.

Q And how is it that you know him? In other 9 words, is it a professional relationship, personal, 1o social relationship? How would you describe it?
A I came to know him through political 12 activity, various forms.
Q What does that mean?
A He was involved in the Republican party, was, during that period of time.
Q Did he ever hold an elected office in the 17 Republican party such as -
A I believe he did.
Q In Kane County, correct?
A Yes.
Q So, the two of you got to know each other through the years through politics in Kane County belonging to the Republican party in Kane County right?
A Yes.
Q. And over the course of the last 20 years, the two of you have had a social relationship. Are you friends?
A We're friends. I don't know that we get together, you know. We may have coffee from time to time, that kind of thing.
Q. At the time that you hired Mr. Carlson, and I believe that was 1996, to the position of special investigator in your office, the two of you were friends, correct?
A Yeah, I knew Phil for a while.
I'm sorry?
A Yes.
Q. And at that time, the two of you were involved in activities related to the Republican party, correct?
A Yes.
Q. So, at that time, you would see each other and work together on various things related to the Republican party and things associated with that, correct?

A Yes.
Q. And how long have you known T.R. Smith?
A He might know this, too; probably at least a dozen years, maybe more now.
Q. How is it that you came to know T.R. Smith?
A Through really two ways. One, he was an officer with Cook County, lived in Kane County, and he also was active in the Republican politics.
Q. Much like Mr. Carlson?
A In a general sense, yes.
Q. He was active in Kane County politics?
A Yes. He lived there.
Q. At the time that you hired him as a special investigator, Mr. Smith was involved in Kane County politics like you were, correct?
A Actually, I don't know if he was at that time. I really don't know if he was at that time.
Prior to that time?
A He was prior to that time.
Q. Do you know whether either Mr. Smith or Mr. Carlson supported your candidacy either in the primary or the general election when you were first elected State's Attorney?
A I know Mr. Carlson did. Sitting here now, Ihonestly can't recall if Mr. Smith did. I don't knowthat he didn't or did. I just don't know.
Q Was Mr. Carlson active in your campaign whenyou were first elected State's Attorney? Do yourecall that?
A Some of it, yes; the general elections, yes.
Q In what way? What did he do for you then?
A The first time?Q Yes.A Put up signs, introduced me to people, takeme around places that he knows or was aware of.
Q Mr. Carlson was described by Mr. Barsanti as someone who has a great deal of contacts in Kane County. Would that be your description of him as well?

A That's part of the description, sure.Q So, it would be accurate to say that Mr. Carlson provided you great assistance in that regard when you first ran for State's Attorney?
A As I say, he introduced me to contacts withpeople he knew.
Q Would it be fair to say that he was may be one of the people that was responsible for getting you elected?
MR. DeROSE: Objection. That calls for a conclusion, but you may go ahead.
BY MR. BERSANI:
Q In your first election as State's Attorney?
A He certainly was helpful.
Q And a result of that when someone helps you in that fashion there's an element of gratitude that would you owe to a person like that, correct?
A There's an element of gratitude you feel, that's for sure.
Q And that you may owe to that person?
A I don't view gratitude as something that's owed. I mean, you certainly feel good things for those that help you.
Q Well, him having helped you in that first election, I mean, certainly, if you had the opportunity to help him again down the road, you would feel that you would do that, correct?
A It would depend on what it was, but if it was something that could be done and I felt right about it, I would.
Q Such as giving him ajob as a special investigator with the State's Attorney's Office, right?
A Say that again?
Q Such as giving him a job as a special investigator with the State's Attorney Office?
A I don't think I owed him that, if that's the question.
Q Well, as I understand it, Mr. Carlson didn'thave any

law enforcement background when he was hiredas a special investigator?
A Is that a question or -
Q Yeah.
A He worked for the Secretary of State, I know that.
Q He wasn't a police officer, was he?
A No, he was not.Q He wasn't an investigator, was he?
A He did investigative work for the secretary of State as far as I know; that was my understanding.
Q Did he come to you and ask for a job or did you seek him out?
A I think it was the latter more than the Page 36former. I had been looking for an investigator for a time to work with Mr. Moore.
Q How did you know that he was interested in the job?
A I asked him if he would be.
Q So, you sought him out?
A I said yes, I did.
Q And you knew at that time in 1996 that the job of special investigator required a person to have police powers, police office status, correct, or peace officer status?
A Not really, no.
Q You knew that required or possibility that someone would carry a weapon, right, with your permission?
A I was aware that if you followed the statutory steps you could appoint a person a peace officer and allow him to carry a weapon.
Q And that it was required that a person have a requisite number of training hours as certified by the Illinois Police Training Board to become a special investigator, correct?
A Yes. If you want them to serve as a peace

officer and act in that capacity, yes.
Q And Mr. Carlson didn't have that
qualification when he was hired in 1996, did he?
A No, he didn't. He wasn't hired as a peace 5 officer either.
Q What was he hired as? A Investigator.
Q So, is it your testimony that you didn't
feel any sort of debt of gratitude to Mr. Carlson and therefore
hired him to the position of special investigator?
MR. DeROSE: objection, asked and answered.
THE WITNESS: I did feel gratitude. I didn't
feel I owed him a job. He had a job with the state, Secretary
of State's Office. He wasn't in need of a
job. Did I give him one because I owed him one? No.
BY MR. BERSANI:
Q What about Mr. Smith, did he assist you in
your prior campaigns for State's Attorney? Let me be more
specific, your initial campaign to become State's Attorney?
A As I mentioned before, I think I did, but if didn't, I honestly
don't recall.
Q Was he actively involved? Do you recall that?
A I don't believe he was, but they get merged
4 after a time, but my best recollection is no, he was 5 not, but
he may have been, I mean, sitting here. He 6 may kick me
later for not.
Q Did you have any conversations with either
Mr. Carlson or Mr. Smith before today, before
stepping into today's deposition, about what you would testify
o may testify to in this deposition?
A Not with Mr. Smith. Mr. DeRose had called
me on -- I believe it was two occasions. Mr. Carlson was
there. I think the first time it was to ask me for an affidavit.
The next was scheduling depositions.
Q Have you ever talked with either
Mr. Carlson, Mr. Smith or Mr. DeRose about the substance

of what you may testify to, either in affidavit or in deposition?
A We spoke briefly this afternoon. I was on the telephone. I believe both Plaintiffs and Mr. DeRose were present.
Q What about prior to today?
A No.
Q Have you ever had any conversations with Mr. Smith and Mr. Carlson about their lawsuit prior to today?
A Not with Mr. -- wait a minute. I don't recall any with Mr. Smith. Mr. Carlson, after he filed the suit, wanted to show me a copy of it.
Q Did you have discussions about the lawsuit or the allegations or anything of that nature?
A He showed me a copy of it after he filed it.
Q My question was, did you have any discussions with him about the allegations of the lawsuit or anything pertaining to it?
A Not a lot, really, none that I specifically recall. It obviously had to do with events after I 16 was the State's Attorney.
Q Do you consider Mr. Smith to be a friend of 18 yours?
A Yes, I do.
Q Did you consider him to be a friend of yours when you hired him in 1999?
A Friendly, I think. I don't know that it would have been a friend as we are now.

The friendship grew over time, is that fair?
A Yeah, um-hmm.
Q And it grew while you were State's Attorney, correct?
A Yes.
Q In fact, the three of you would have lunch together on a fairly regular basis, correct, while you were State's Attorney?
A I don't know what regular is, yeah, but

1o sure, we had lunch from time to time. 11
Q Once a week?
A At least, yeah.
Q Twice a week?
A On some occasions.
Q On the average, how many times a week would you have lunch with the two of them?
A I'd say on the average once or less.
Q Did you ever have lunch with any other 19 investigators in the office hired by you?
A Yes.
Q Not nearly as frequent as these two 22 gentlemen, correct?
A No, with the exception of possibly Mr. Moore
when he was there. Obviously not after he became coroner.
Q How often did you have lunch with Mr. Moore?
A About the same number.
Q And Mr. Moore was one of your appointed special investigators like Mr. Carlson and Mr. Smith, correct?
A Eventually, yes.
Q Did you ever go out to dinner with Mr. Carlson, Mr. Smith, or Mr. Moore while you were State's Attorney?
A I don't recall it now, unless it would have been for, you know, at a joint political function where we all would have been there.
Q Mr. DeRose asked you a question earlier about whether or not -- Mr. DeRose asked you questions earlier about whether you required political affiliation to be a requirement of the job for anybody working in the State's Attorney's Office. Do you remember that question?
A There were several, yes.
Q Did you ever at any point during your tenure as State's Attorney send out a questionnaire to
employees in your office asking them where theylived, where they voted, what their precinct was or

who their precinct captain or committeeman was?
A Where they lived, what district they lived in. I don't believe I ever asked who a precinct committeeman was.
Q What was the purpose of that questionnaire?
A Mostly relations with county board members that might be in that particular district and general information about emergencies and who to contact.
Q Was it also important to know where they lived for purposes of your own campaigns?
A No.
Q Not at all?
A No.
Q Did you ever have lunch with John Barsanti during your tenure as State's Attorney?
A Yes.
Q How often?
A Not very often. John didn't do lunches generally. He ran during that period of time, and most -
Q Okay. Could you look at -- there's a stack of exhibits right in front of you there. If you could look at Exhibit No. 1, please.
A Okay.
Q Exhibit No. 1, it's obviously a statute thatsets forth the powers and duties of Illinois State'sAttorney, correct?
A Yes.
Q And you've had occasion to review thisstatute, evaluate it, interpret it over the years,correct?
A Yes.
Q If you can look at the second page,Paragraph B, there is a paragraph that deals withspecial investigators, correct?
A Yes.
Q Now, that paragraph gives the authority tothe State's

Attorney to appoint one or more special investigators for various functions, correct?
A Yes, it does.(Exh. No. 6 identified.)BY MR. BERSANI:
Q And I'm going to hand you what I've markedas Deposition Exhibit No. 6. I'm just going to continue with consecutive numbers here, even thoughit's Akemann deposition. There's No. 6, and this is,
in fact, a copy of the Certificate of Appointment by you appointing Phil Carlson as a special investigator, correct?
A That's what it appears to be.
Q It's got your signature on it, correct?
A It appears to be.
Q To your knowledge, this is a true and accurate copy of the original certificate of appointment?
A It appears to be.
(Exh. No. 7 identified.)
BY MR. BERSANI:
Q And then Exhibit No. 7, same type of document, only it is a copy of a Certificate of Appointment of T.R. Smith by you to the office of special investigator, right?
A Appears to be.
Q The appointment by you of T.R. Smith and Phil Carlson to the position of special investigator was made pursuant to your authority as State's Attorney under the statute, which is Exhibit No. 1,
A That's partially correct.
Q What does that mean?
A Well, that's a statute that gives certain
5 powers to the State's Attorney. There's other constitutional authorities the State's Attorney would ask, and there is what we commonly refer to as 8 internal control

statutes that I interpreted would 9 allow the employment of any person for a lawful purpose.
Q Did you employ Mr. Carlson or Mr. Smith to any other position other than special investigator?
A N0.
Q Is there some other statute or constitutional provision that sets forth an investigatory appointment or authority other than Exhibit No. I that you're aware of?
A Not by specific mention of a particular job 19 as special investigator. I don't know that those words are used anywhere else.
Q It's my understanding that this statute was passed about 10 years ago in order to give the State's Attorney the power to employ special investigators with police powers, correct; is that your recollection?
A Yes, that's part of it. Obviously, that subject has history to it. It goes back quite a ways.
Q Now, the power of appointment -- your power of appointment as State's Attorney of a special 8 investigator can only be exercised by the State's Attorney, correct?
A Yes.
Q And if a State's Attorney wanted to remove a special investigator for a particular reason, that can only be exercised by the State's Attorney, 14 correct?
A That's correct.
Q And any employment discipline within those parameters, suspensions, reprimands, whatever, can only be done by the State's Attorney, correct?
A Unless the State's Attorney delegates it to someone else.
Q But ultimately, you would be the final decision maker on issues like that, correct?
A Yes.
Q And so, it's accurate to say that special

2 investigators serve at the pleasure of the State's Attorney, correct?
A Yes.
Q And in fact, there's no legal duty for a State's Attorney to employ or appoint special investigators, is there, that you're aware of?
A There's no mandatory duty to appoint special investigators that I'm aware of.
Q So, it's your understanding that a State's Attorney has really complete discretion on whether to even employ special investigators or not, correct? A Yes.
Q And if you were elected as State's Attorney or reelected, you could choose to eliminate the position of special investigator if you so choose in your discretion, correct?
A Well, obviously, if there was no other purpose involved in it. It's part of why we're here, is it not?
Q I'm sorry?
A That's probably why we're here; otherwise -
Q Let me rephrase the question. If you were reelected State's Attoreny or elected, and as a matter of policy philosophy you wanted to eliminate 3 the position of special investigator, you could do 4 that lawfully, correct?
A That would be my understanding.
Q In that statute, Exhibit No. 1, it states 7 that the State's Attorney shall have the authority to appoint special investigators to serve subpoenas, make return of process, and conduct investigations 1o which assist the State's Attorney in the performance I of his duties, correct?
A Yes.
Q And it goes on to say that the special investigator can carry firearms with the permission of the State's Attorney and then also act as a peace officer with the

requisite training, correct?
A Yes.
MR. DeROSE: You're telegraphing sentences here, but that's all right. Objection to the form of the question. Go ahead.
(Exh. No. 8 identified.)
BY MR. BERSANI:
Q I'm going to hand you Exhibit No. 8, which is a document obtained and produced to counsel. This is a document from the State's Attorney Office from the personnel files of the Plaintiffs, which set forth the duties of special investigators. Do you recognize this document?
A Not specifically. I recall something like this. Whether it's this or not, I don't know.
Q Do you have any reason to dispute that sets forth accurately the duties of special investigators while you were State's Attorney?
A It appears to follow the statutory language as I recall it.
Q Okay, and that was going to be my next question, that it for all intents and purposes is identical to the statutory language, correct?
A It appears to be, yeah.
Q Now, as State's Attorney, you have the authority to appoint special investigators. You also have the authority to assign directly and personally special investigators to any particular task or activity, correct?
A Yes.
Q Including to conduct investigations which would assist you as State's Attorney in the performance of your duties, correct?
A Yes.
Q That's a power that you don't have to

delegate to an assistant if you don't want to, correct?
A I think you need to clarify it or at least please clarify that.
Q I'll withdraw that question.
As State's Attorney, you have the power to, for example, require that a special investigator report back to you directly about his activities or the fruits of any investigation, correct?
A Sure.
Q And you'd agree with me that the statute and the job description empower you as State's Attorney to assign a special investigator to conduct investigations into any matter which is in your power to investigate, correct?
A Yes.
Q And that would include any civil matter, criminal matter, administrative matter, correct?
A Yes.
Q That would include assignments to the grandjury, if necessary, correct?
A Only with the consent of the grand jury. There's a process for that.
Q They'd have to become an agent of the grand jury?
A That's a statutory process, too. There's a motion, and it has to be a motion by certain number of the grand jurors and the foreperson and present it to the court, and the court would appoint investigators for the grand jury based on that motion.
Q Is it your testimony that you cannot as State's Attorney unilaterally appoint a special investigator to assist a grand jury in whatever

function they need assistance with?
A That's right.
Q Okay. I asked that because Mr. Barsanti testified to something differently earlier.
A That's my understanding based on case law.
Q Mr. Barsanti during your tenure was the person who was basically supervising all grand juries, correct?
A No. That would have been lower. It would have been while he was head of criminal. I believe he assigned that to someone else or the chief of criminal did when he became First Assistant.
Q Pursuant to the statute, a job description of State's Attorney could appoint a special investigator to investigate official misconduct, correct?
A If it's a state alleged offense, yes.
Q You could appoint somebody to investigate official misconduct by whether it's a county officer or employee or someone from a municipality or local government within your county, correct?
A Yes. I'm assuming by official misconduct you mean the statutory definition as opposed to something federal.
Q Obviously something related to their official duties?
A Yes.
Q And so, if you assigned a special investigator as State's Attorney to investigate some matter that's within your power to investigate, you would expect that investigator to come back to you and describe for you or give you information as to what they investigated, correct?
A Unless I told them to give it to somebody else, yes.

Q And so, as a result of an investigation that was assigned to a special investigator, decisions are made by either yourself as State's Attorney, if you 8 to choose, or one of your assistants, correct?
MR. DeROSE: well, objection. That assumes a lot of -- a hypothetical doesn't cover all the possibilities. Just because a man tells him something doesn't necessarily -
MR. BERSANI: I'll rephrase the question. BY MR. BERSANI:
Q As a State's Attorney, if an investigation required that the investigator come back to you and report back to you directly, you would rely upon what that person has to say to you either negatively or positively, however you want to rely upon it, in making decisions, correct?
MR. DeROSE: Objection. We don't know what the report would be the person would say. When you say rely upon it negatively, you mean you wouldn't rely on it? Objection to the form of the question.
BY MR. BERSANI:
Q Do you understand the question?
A Yes, I do.
Q How would you answer it?
A Are you done?
Q Yeah, we're done.
A I'd certainly give it weight and whatever - it depends on a lot of things, the nature of the topic, the nature of the work that was done. It certainly would be given consideration.
Q And decisions are made, and those decisions run the gamut of whether to charge somebody with a crime, whether to bring a case before a grand jury, whether to investigate further. I mean, there's a gamut of decisions that are made as a result of investigations by special investigators, correct?

A Yes.
Q And so, in effect, special investigators have input into those decisions by virtue of their investigation and the information they bring back, correct?
A If input means a factual report, they have input. If input means suggestions as to dispositions or further activity in terms of prosecutions, no.
o You mean you would not expect a special investigator to give you a recommendation as to whether to make a certain decision -
A No.
· -- as a result of an investigation?
A No.
Q. Have you ever asked for that type of recommendation or conclusion or opinion by investigators?
A Not that I recall, no.
Q. An investigation done by a special investigator pursuant to the statute in the job description assigned by you as State's Attorney would be considered confidential by you, correct?
A Well, liken to any investigation, yeah, any police investigation would be that way properly, I would think.
Q. And any discussions that a special investigator would have with you as State's Attorney as a result of their investigation would be done in confidence and in private, correct?
A There may be others involved in the discussions, depending on who was all involved in the 3 process.
Q And who was involved in the decision, right? 5 A Yes.
Q Obviously, the general public wouldn't be 7 invited to that meeting, correct?
A NO.

Q So, the confidentiality of an investigation done by a special investigator would not only be a requirement but also would be a necessity because you don't want that investigation jeopardized or the integrity of it jeopardized or any subsequent prosecution that may come out of it, correct?
A Can you repeat that, sir?
Q I don't think I could.
Could you repeat that question?
(Question read.)
THE WITNESS: I believe that's correct, the same as any police investigation. 21 BY MR. BERSANI:
Q So, the process of appointing a special investigator to conduct an investigation into some matter by you as State's Attorney gives rise to thepotential for a close working relationship between yourself and the investigator, correct?
A That's subjective. You know, close, I don't know what that means, really. You work closely with police officers when they're working on cases and you're working on them together, sure.
Q So, you'd work closely with investigators that you appoint to do an investigation?
A If I'm directly involved in it, which for me was rare.
Q The statute allows you to do that, right?
A Would have permit me to do that, sure.
Q And if you were to as State's Attorneyassign a special investigator to conduct aninvestigation and bring back information to you thatyou're going to rely upon in some decision, you'dwant to trust the special investigator, correct?
A You'd want to trust that they're giving youaccurate information.
Q Right, and you want to trust that they'reconducting the investigation in a proper manner, correct?

A Yes.
Q And you want to trust that the individual is honest and has integrity and ethics, correct, in ft - manner in which they conduct their investigation?
A Yes.
Q And the position of special investigator would be a position that you would want occupied by someone that is loyal to you as State's Attorney, correct?
A You want them to occupy every position that way. There's certainly no exception there.
Q So, special investigator is a position that you would demand personal loyalty of, correct, to you?
A I don't know that I'd go that far, no.
Q Well, you wouldn't want a special investigator that you appoint loyal to some other person, would you? That's a bad question. Let me reask that.
Let me ask you this: Do you have a philosophy of personal loyalty as a State's Attorney; did you?
A Philosophy of personal loyalty?
Or approach or demand or requirement.
MR. DCROSE: Objection. I don't know which one of those questions you want to ask.
BY MR. BERSANI:
Q Let me ask you this: Does personal loyalty mean anything to you as State's Attorney and how you deal with your employees?
A Define for me what you mean by personal loyalty.
Q Well, does personal loyalty mean anything to you? I mean, does that phrase conjure up any philosophy or approach that you had as State's Attorney?

MR. DeROSE: I object. I don't understand that question. Are you asking him to define the words personal and loyalty?
MR. BERSANI: No. BY MR. BERSANI:
Q Do you understand the question?
A Is your question do the words personal and loyalty have any meaning to me when I was a State's Attorney?
Q Right.
A I don't know that I used those words, but you obviously want people that are there to help you do your job as best as you can. If that's what that means, yes.
Q Did you ever state to your division chiefs in a meeting in your office that from now on all new hires are to be evaluated for what they can do for me, their loyalty to me, what they bring to the table?
A I don't remember saying that, no, and I don't remember saying that.
Q But that's generally your approach or philosophy that you took with your division chiefs while you were State's Attorney?
A I don't know if I could say that, no.
Q Let me give you a hypothetical. Let's say that you're up for reelection for State's Attorney and one of your special investigators decides to publicly support your opponent, publicly campaign for your opponent, and publicly criticize your competency, your honesty, your integrity, and so forth, would you keep that person in the position of special investigator?
A I don't know; that never happened to me.
Q Well, can you tell me now whether you wouldkeep that person in that position?
MR. DCROSE: Objection to the extent that thatcalls for conjecture on THE WITNESS: Say that again the witness' part, but if hecan do it, fine., counsel, the question.MR.

BERSANI: Why don't you repeat the question.(Question read.)THE WITNESS: You probably wouldn't want to,that's for sure.MR. BERSANI: I need to take a short break.(Short recess taken.)BY MR. BERSANI:
Q Mr. Akemann, do you have knowledge that either Mr. Carlson or Mr. Smith performed anypolitical activities on your behalf during businesshours while employed with the State's Attorney's Office?
A Do I have knowledge that they did duringbusiness hours?
Q Right.
A. No, I don't.
Q Do you have any knowledge of either Mr. Smith or Mr. Carlson sending out a-mails to the State's Attorney's Office computer system to fellow employees urging them to contribute to your campaign, attend parades, build floats, things of that nature?
A Relative to a political campaign of mine?
Q Um-hmm.
A No, I don't.
Q What role did Mr. Carlson play in your campaign, in your last campaign for reelection?
A He helped where he could. He had had a stroke, I think, as I said before, and did different things for me, and where and when he was up to doing them, wanted to do them.
Q Specifically, do you recall what he did?
A Occasionally, we'd go to a meeting together. He'd talk to people on my behalf.
Q He would attend functions with you, political functions?
A Yes.
Q He would -
A Such as committeemen meetings.
Q I'm sorry?

A Such as precinct committeemen meetings.
Q Or political functions of other officials,correct?A
You know, some, yes.
Q Was he your campaign manager?
A No.
Q Who was your campaign manager?
A It would be Thomas Chase.
Q Was Thomas Chase always your campaign manager?A I called him my chairman. I had a chairman and treasurer. That was the only office.
Q Who was your treasurer?
A My brother, Peter.
Q Did Mr. Carlson participate at all in any of these political decisions that needed to be made relative to your campaign for reelection?
A Yes. He would give his opinion on different things.
Q Did you consider him during that campaign to be an adviser of yours?
A Yes.
Q How about Mr. Smith, did he play a role in your campaign?
A Yes.
Q What role did he play?
A Similar to Mr. Carlson.
Q He would attend functions with you, political functions?
A Yes.
Q He would drive you to functions, correct, on occasion?
A Yes.
Q He would advise you on strategies or decisions that needed to be made?
A He'd give me his opinions.
Q And you'd either accept or reject his opinions?

A Yes.
Q Did any of this occur during business hours at the State's Attorney's Office?
A No, not really.
Q Well, there were occasions when either one of these Plaintiffs would attend luncheon functions with you, correct?
A Yeah. If you mean during a lunchtime or something, yeah, we'd talk about political functions.
Q There were occasions in which either one of these gentlemen would drive you to luncheon functions that were political in nature, correct?
A Yes.
Q And obviously, while they were doing that, they weren't engaging in any investigatory function pursuant to the statutory duties we talked about earlier, correct?
A Probably not. It would depend on the specific time and place.
Q Who kept your campaign schedule?
A It would have been kept at my campaign office.
Q Was your campaign schedule ever kept at your office at the State's Attorney's Office?
A I have a copy of it.
Q Who maintained it at the State's Attorney's Office, who kept it?
A I believe, as I said, it was kept at the campaign office.
Q Was it kept by you personally in your office?
A You mean did I physically have it in my office?
Q Right.
A Did I have a copy of it?

Q Right.
A Yeah, I had one with me so I know what's coming.
Q What did the schedule look like? Was it a handwritten schedule, was it a computer-generated calendar, or what?
A It came in various forms over time.
Q There were times when other members of the State's Attorney's Office would attend political functions besides these two investigators, correct?
A Yes.
Q And somebody would have to tell people where to go. Who would have that been?
A It could be any number of people. No one particularly was assigned universally to that function.
Q Could it have been either Mr. Carlson or Mr. Smith?
A It would depend on the function. It's possible, yeah
Did Mr. Smith assign people to go to various political functions on your behalf during that election?
A Not that I recall, no.
·Do you know whether he kept a calendar of your campaign events or activities?
A You mean did he have one in his possession?
Q.Yeah.
A I don't know if he did. He might have.
(Exh. No. 9 identified.)
BY MR. BERSANI:
Q. I'm going to hand you what's been marked as Exhibit No. 9This is a group exhibit consisting of four pages. Okay. If you could take a look at Exhibit No. 9, and this appears to be a --

there's four pages, like I said, and it's a calendar with entries on it for October of 1999 and November of 1999. Do you recognize any of these documents?
A It appears to be. I have four with October on it.
There should be three Octobers and one November, right?
A Okay. Yes, correct.
Q Three Octobers and one November, and it appears -- would you agree that -- if you look on the bottom of the October calendar, it looks like somebody's updating the calendar as of a certain date, and that's why there's three Octobers, right?
A It appears that way.
Q I'm sorry. I had asked you whether you recognized these documents at all, and you said you did.
A Appears to be a listing of events related to either Republican functions of the campaign generally.
Q Do you know who generated these documents?
A No, 1 don't.
Q Do you know whether anyone within their office was assigned to generate this document?
A Not that I recall. This probably was from the campaign office.
Q Do you know specifically whether T.R. Smith or Phil Carlson maintained this calendar and put information on it, assigned people to various events?
Do you know that or not?
A I don't know whether he either kept this calendar. I assume that both would have copies of it. It would have been distributed at the campaign office.
Q Looking at the document, if you look at the various entries, say, for example, on the first page, 8 which appear to be updated as of 10-4-99 on the bottom there, it states -- if you look at the various 1entries, there's initials after various entries, for example, October 4th, T.R. follows a particular entry. Do you see that?

A Yes.
Q Would that be T.R. Smith?
A That would be my best guesstimate at this 16 point, yes.
Q And let's get another example here. On the 18 next page, the document that's updated as of
19 10-19-99, if you look at, for example, October 7th, 20 Phil's name is in parentheses after that entry, correct?
A After which entry, sir?
Q October 7th, Cancer Society.
A The name Phil is there.
Q That would be referring to Phil Carlson, 3 correct?
A It's possible that it could.
Q Was there any other Phil in the office at 6 that time?
MR. DeROSE: which office, the State's Attorney's Office?
MR. BERSANI: The State's Attorney's office.
THE WITNESS: Yes, I believe there was. BY MR. BERSANI:
Q In any event, you believe that refers to Phil Carlson, correct?
A It's most probable that it does.
Q Okay, and the events which are listed on these calendars are all political or politically-related events that pertain to somehow to your reelection for State's Attorney, correct?
A Whether they're political in nature or not, they would have been a place I would be at, probably.
Q A place you'd be at or -
A Or somebody asked me to be at or there was a 23 list of potential places.

Q Do you have any idea who inputted the initials for T.R. or Phil or any other initials which pertain to individuals after any of the entries in these calendars? Any idea who would have done that?

Not right off the top, unless it would be Sue, but -
Q Sue who?
A Sue Lewis.
Q Lewis?
A Um-hmm.
Q Who was Sue Lewis?
A She worked for the campaign office. The
truth is I don't know who inputted these. You could probably speculate on it. Some things don't appear to be politically related.
Q Take a look at the document -- I'm almost done in a few minutes.
If you look at the documents in front
of you -- they're not the ones directly in front of 20 you. There should be a document which is Exhibit No. 4. Do you recognize this document at
all?
A I believe I do.
Q What do you recognize the document as?
A I recognize it as one of the documents Mr. DeRose sent me approximately a month ago.
Q Were you familiar with this document? Did you recognize it at all at the time Mr. DeRose sent it to you?
A No.
Q Are you familiar with the AutoTrack system?
A Not really, no.
Q As I understand, it's a computer system that allows someone to -- it's an investigative tool, essentially, service, that you can locate people or find out information on people that pertains to the personal history, addresses, things like that. Is that something you recall being used in your office 16 during your tenure?
A I know there was one or two different
18 systems that were used by the investigators. If this was one

of them for sure, I couldn't tell you right now. I don't recall if it was or not.
Q Do you remember the other system at all?
A Lexis, I believe.
Q Well, the systems that were used -- I'm sorry if you're not done.
A I know there were, you know, information-gathering systems that were employed, but which they were and at what times, I don't recall.
Q Those systems certainly there would be -they only could be used for lawful purposes, correct, pertaining to your office, correct?
A Yes.
Q Did you have a policy that prohibited personal use of those systems or political use of I 1 those systems?
A Both.
Q Do you recognize the name on the top sheet 14 of this exhibit, Linda Siete?
A Yes, I do.
Q Who do you recognize her to be?
A I think she was Meg's campaign manager, coordinator, at least there's a person with the same name. From the address, it appears to be the same person.
Q Would either or both T.R. Smith and Phil Carlson have access to AutoTrack or the other system we talked about?
A They may. I think the one that I recall bringing the request for systems like this would have been Ramona, but it would probably be something that 4 search information generally would have been 5 accessible by investigators.
Q Are you aware of any investigation of Linda 7 Siete or Cip Siete during your tenure as State's 8 Attorney?

A No.
Q Do you have any idea why someone did a search of Linda Siete or Cip Siete as documented in 12 Exhibit No. 4?
MR. DCROSE: Objection, that assumes someone did.
THE WITNESS: I don't know if somebody did or not.
BY MR. BERSANI:
Q Well, there's a document generated. So, someone must have generated it, correct?
MR. DCROSE: Objection. If he don't know this document, how does he know where it was generated from? Objection. You're asking him to assume a lot of evidence. He said he's never seen this before. THE WITNESS: I said I saw it before from -
MR. DCROSE: From Me.
T1IE WITNESS: From Mr. DeRose.
BY MR. BERSANI:
Q Obviously, this document was generated at the State's Attorney's Office, correct?
MR. DCROSE: Objection.
THE WITNESS: i don't know where it was generated.
BY MR. BERSANI:
Q Do you know of any reason why someone would access the AutoTrack system to investigate Linda Siete?
A Someone at my office during my tenure?
Q Right.
A Not that I know of, no.
Q Do you know whether the AutoTrack system was used for political reasons, political investigations, at your office?
A Assuming I had one, I don't know of any system, search system, that was used for political purposes.
Q Do you recall signing a contract with the AutoTrack system company providing you the service or providing the State's Attorney's Office the service?

A I remember signing or engaging in one or more services over time. Who they were, I don't recall. I believe on those occasions Ramona would 5 bring them to me.
Q Do you have knowledge of anybody employed by 7 you as State's Attorney conducting any type of 8 investigation into anyone associated with Meg Gorecki?
A Say that again.
Q Do you know of anybody employed by you as 12 State's Attorney conducting any type of investigation 13 into Meg Gorecki or anyone associated with her 14 campaign?
A Anyone employed by me?
Q Um-hmm.
A No.
Q Do you know whether either Phil Carlson or T.R. Smith investigated Linda Sicte or Cip Siete?
A I don't know. Obviously, you can ask them.
Q If you could look at Exhibit No. 5, this is a memorandum to John Barsanti from Drew Sosnowski. Do you see that?
A That's what it indicates.
Q Do you recognize this document?
A Yes.
Q Have you seen it before?
A Yes.
Q Mr. DeRose show it to you?
A He sent it to me in the mail.
Q Did you recognize it at the time you saw it when you received it by Mr. DeRose?
A No.
Q Do you know what it's pertaining to, the subject matter?
A Just I know what I read.
Q Are you familiar at all as you sit here

today with this scale for review that apparently on the face of this document came from Drew Sosnowski?
A No, I'm not, not the colors, not the numbers.
Q What about the categories, productivity, loyalty, follows directions, easy to supervise big picture. Are you familiar with what any of that means?
A It would only be conjecture.
Q What's your conjecture?MR. DeROSE: Objection to the extent it is
conjecture, but you can go ahead.
THE WITNESS: Just those were things that whoever authored this, if it was Drew Sosnowski, felt were relevant to the subject. I don't know.
BY MR. BERSANI:
Q Do you recall ever approving this scale for review?
A No, I don't.
Q Do you recall ever approving any scale that was designed for employee evaluation independent of this document?
A Yes.
Q Any of the categories listed on here, were they part of what you recall?
A Not in those words, no. Certainly, productivity would have been a part of it.
Q Putting aside this document, was loyalty ever a category of evaluation of any employee in the State's Attorney's Office?
A You mean relative to pay?
Q Relative to employee evaluation performance evaluations or pay raises.A I don't recall that word being used relative to that type of function, no.

Q Was it ever used relative to any other type of function?
A There would be some concerns from time to time about, for instance, the assistants that would want to push the blame on other assistants for decisions that were made, and if that's what the loyalty issue meant, that may have been part of an evaluation process.
Q Do you know whether Mr. Smith or Mr. Carlson were ever a part of any type of evaluation in terms of their job performance or potential pay raises or promotions or anything of that nature?
A Yes.
Q And who would have done those?
A It would have been Mr. Barsanti.
Q Did you ever participate in those evaluations?
A Not prior to getting Mr. Barsanti's recommendations, no.
Q Were those recommendations ever put in writing?
A They might have been.
Q If I told you that their personnel files don't contain any written evaluations of their job performance, any reason to dispute that?
A No. I don't know if you found that in any file.
Q What does big picture mean? Does that mean anything to you?
A Well, no. One could conjecture things. That's all they'd be. What does it mean to me sitting here -
MR. DeROSE: Objection to the extent it is a conjecture.
TI IF WITNESS: Looking at the wholeness in the

office, not just the narrow focus necessarily of where a person's currently assigned.
BY MR. BERSANI:
Q Did you either direct Barsanti or Sosnowski to come up with this scale for review of employees at or around the time of this memorandum, November, 1999?
A I don't remember doing so.
Q A couple other questions. Let's take thetime period of -- or strike that. During the time period that Phil Carlson was employed by you, did you have contact with him on a daily basis?
A No.
Q How about the time period that you first found out that Meg Gorecki was going to run for State's Attorney against you till the end of your term, did you have contact with him on a daily basis?
A No.
Q How often would you have contact with him during that time period?
A I can't remember when I found that out. It depends a lot on what each of us were doing, I would assume.
Q Let's take the time period September, 1999, through the primary, which would have been March of 2000, right?
A Okay.
Q Did you have contact with Phil Carlson or T.R. Smith on a daily basis during that time period?
A No.
Q How often would you have contact with T.R. Smith during that time period?
A I don't really recall. Their office, physical office, was located opposite where I was.

It depends if I went down there for any reason or had an occasion to go down there.
Q Was there a requirement that if any of your employees, assistants, or any of your employees wanted to see you they had to make an appointment with your secretary?
A No.
Q There was no such requirement?
A No. It was an open door.
Q At some point in time, Phil Carlson was on disability from work, right?
A Yes.
Q That would have occurred in the middle of the campaign, your reelection campaign for State's Attorney?
A It would have been winter of that year.
Q '99,2000?
A Yeah. Exactly, I don't recall.
Q Do you know how long he was on -- and he was on a leave of absence or paid disability, correct?
A I don't know how it was paid. It was a medical leave.
Q Do you know what he was doing during the time period of his medical leave?
A Not always, no.
Q Was he at your campaign headquarters for conducting any campaign activities on your behalf during the time of his medical leave?
A Sometimes he was.
Q What type of activities would he engage in?
A Sit and call people.
Q Put up signs?
A He did some of that.
Q Take down signs?

A I don't know what you mean by take down. You mean by implication, you know, illegal activities; is that what you're asking?
Q If someone wanted a sign taken down for some reason, would he go out there and be the one to take it down?
MR. DeROSE: what do you mean somebody? Are you talking about some neighbor says take your sign out of my yard?MR. BERSANI: I asked because John Barsanti mentioned that he would take down signs. I don't know what that means.
THE WITNESS: He did some of that. He'd get into sign and questions. He did some of that.
BY MR. BERSANI:
Q Was he still attending functions with you, political-type functions, during the period of his medical leave?
A Sometimes I wouldn't see him for quite a while. It depends really on how he felt.
Q Was his medical leave more towards January or December of 2000? I'm sorry, December of 1999, January of 2000?
A It was in that time after he had a stroke, and it lasted past the primary.
MR. BERSANI: Let me take a 30-second break, and I think I'm done.
Do you have questions, John?
MR. DCROSE: Just a few.
(Short recess taken.)
BY MR. BERSANI:
Q Just a few questions. Were there any occasions in which county vehicles were used - strike that.
Were there any occasions where county

vehicles were observed at your campaign office?
A Yes.
Q And whose vehicles?
A It would depend. People would stop there if they're looking for me or looking for somebody or something.
Q Mr. Akemann, during your tenure as State's Attorney, did you demand political allegiance to youas a requirement for the job of special investigator?
A I don't think so, no.
Q How about personal allegiance?
A No, not really.MR. BERSANI: I don't have anything else.MR. DeROSE: Just a little bit.REDIRECT-EXAMINATIONBY: MR. DeROSEQ You told counsel that Phil Carlson was nothired as a peace officer; he was hired as an investigator. There's a distinction in your mind.
What did you mean by that?
A There have been investigators in the State's Attorney's Office, at least people who were called that, had that title since I first started working there late '70s.
Q Did you expect some of your investigators to be more involved in police officer type work, that is armed law enforcement work, as opposed to investigative functions?
A Eventually, it came to that. You know, it didn't start out that way.
Q At some point during his employment with your office, you did require Mr. Carlson to undergo the training program to be allowed to carry a firearm with the office?
A To be a peace officer, um-hmm.
Q And he met those requirements as required by

statute?
A Yes.
Q You made a statement to counsel that you could eliminate a person from a position in your office as long as it was not done for an unlawful purpose. Do you remember making that statement?
MR. BERSANI: Object. I think that mischaracterizes his testimony. BY MR. DeROSE:
Q Do you remember that kind of an answer where you said it's not done for an unlawful purpose?
A I believe I do, yeah.
Q What did you have in mind when you said that you could eliminate a person from your office as long as it's not done for unlawful purpose?
MR. BERSANI: I'll object based on not relevant in terms of what this witness' opinion is in that regard.
Go ahead and answer.
THE WITNESS: My understanding of the law then and now is you can't terminate a person for an unlawful purpose.
BY MR. DeROSE:
Q How about a person who is speaking out on a matter of public concern about violations of the law, can you terminate a person for that?
A It was my general understanding then and now, and it really came out of a case that I was involved in when I was in the Civil Division that went up to the Seventh Circuit, the Fakrodan case, but generally speaking, you can't terminate someone's employment for exercising their First Amendment freedom as a general proposition, case law, et cetera, for racial or whatever.
Q In giving some of the other answers to counsel, you indicated that an investigator, a special investigator in your office, has input into your decisions to the

extent that he or she gives you a factual report, but you also indicated that an investigator does not have input into the decision as
to whether or not to prosecute. Do you remember that line of questioning?
A Yes.
Q Can you tell us why it is that you don't allow the special investigators to have input into the decision of whether or not to prosecute?
A Well, it's not their function. The prosecutorial decisions are to be made by assistants.
Q Assistant State's Attorney and the State's Attorney?
A Yes.
Q You've told counsel that the confidentiality
of an investigation must be protected, and you expected it to be protected by all the persons whowere working in your office, is that correct?4
A Yes.5
Q Did you ever observe Mr. Smith not to be6 observing the confidentiality of the investigations going on in your office?
A No.9
Q Did you ever observe Mr. Carlson to fail to observe the confidentiality of the investigations that were being conducted in your office?
A No.13
Q You indicated for counsel that you expected the investigators to have integrity, is that correct?
A Yes.16
Q Did Mr. Smith at any time in your experience while you were State's Attorney fail to have the kind of integrity that you expected of him in that office?
A No.20
Q Did Mr. Carlson ever fail to show the kind of integrity that you expected of an investigator in your office?

A No.
Q You said that you wanted people out excuse me. You wanted people who are there to do
their job. Do you remember making that kind of an expression?
A Yes.
Q Did Mr. Carlson impress you as a person who was there to do the job you expected of him as an investigator of the State's Attorney's Office?
A Yes.
Q Did Mr. Smith impress you as the kind of person who was there to do his job?
A Yes.
Q Now, counsel asked you if you would fail to hire or if you would terminate a person if you had reason to challenge their integrity, and I think you indicated you would, is that correct?
A Yes.
Q If an employee is -- and you indicated if an employee was speaking out on behalf of your opponent, you would find that to be a problem for you to retain him or her, correct?
A I said you would certainly not want to have people that are-
Being supportive of your opponent?
A Yes.
If you had an employee who was supporting your opponent and speaking out because you, as the opponent, had broken the law, would you believe that you would have the right to discipline that employee, anyway?
A As I think I indicated before, my understanding from my experience was you couldn't impose discipline for a person in exercising their First Amendment Right. I've read Rutan, as we all have, and there's exceptions to that.
Q. Mr. Akcmann, do you believe as State's Attorney you

would have the authority to require an employee to remain silent if the employee has learned of a breach of the laws of the State of Illinois?
A I wouldn't have -
MR. BERSANI: Objection, relevance.
BY MR. DCROSE:
· You may answer.
A I don't think I'd have that right. I did
not feel as the State's Attorney I had that right.
MR. DeROSE: i have no further questions.
RECROSS-EXAMINATION
BY: MR. BERSANI
Q. You indicated there are exceptions to the prohibition on firing somebody for political reasons, right?
A Sure.
Q. That generally involves employees who occupy positions for which political loyalty affiliation are an appropriate job requirement, correct?
A Well, from Elrod through Rutan and its progeny
Q. Looking at the statute, Exhibit No. l, and the job description, which is Exhibit No. 8, there's nothing in either of those two documents that prohibit or preclude a special investigator from having input into a decision made by either you as State's Attorney or one of your assistants, correct?
A Your question was, is there anything in
there that prohibits them or precludes them from having input into a decision the State's Attorney or
an assistant made?
Right.
A Not to my knowledge.
Q That's something that you as a State'sAttorney would decide to -- whether or not to allow
or not, correct, in your discretion?
A Yeah. You know --

Q So, if a special investigator -- go ahead.
A The more complete answer involves around what you mean by input.
Q Whether it be factual input, which you indicated earlier does occur or recommendations as to whether to bring charges or whether not to bring charges or investigate further, I mean, those arc things which, according to the language of the statute and job description, you could allow from a special investigator, correct?
A Could I ask a special investigator what do you think I should do? Yeah, I could ask that, sure.
Q Right. Okay.
A Nothing prohibits me from asking that question.
MR. BERSANI: Thank you. We're done.
MR. DeROSE: You have the right to review this transcript for its accuracy when it's finally prepared or you can waive signatures, and that Page 94decision is yours.THE WITNESS: I don't waive signatures.
MR. DeROSE: So, the signatures are reserved.

(Further deponent saith naught.)

FEDERAL RULE OF CIVIL PROCEDURE
RULE 20 (f) (1) CERTIFICATE

I, JEAN M. HINCKS. , a Notary Public in and for the County of Cook and State of Illinois, and a Certified Shorthand R,.porter of said state, do hereby certify that on. to wit, the 11th, July. 2002, personally appeared before me at 15 Spinning Wheel Road, Hinsdale, Illinois, JOHN BARSANTI produced as a witness in said cause. 13

I further certify that said witness, JOHN BARSANTI

was by me first duly sworn to testify the truth, whole truth, and nothing but the truth in the cause aforesaid before the taking of the deposition; that the foregoing deposition was recorded stenographically by me and was reduced to computerized transcript under my direction, and that the foregoing is a true and correct record of the testimony given by said witness.

I further certify that review of the 23 transcript by the witness was not requested by the witness or by a party before completion of the deposition.

I further certify that I am not a relative or employee of attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

I further certify that my certificate annexed hereto applies to the original transcript and copies thereof, signed and certified by me only. I assume no responsibility for the accuracy of any reproduced copies not made under my control or direction.

_____

/s/ Jean M. Hincks, CSR

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Phillip D. Carlson	)	
and Thomas Smith	)	
Plaintiffs,	)	No. 01 C 9235
	)	
v.	)	
	)	
Mary E. Gorecki, et. al,	)	
Defendants)		

FEDERAL RULE OF CIVIL PROCEDURE 30 (e)
STATEMENT

I hereby state I have read the foregoing transcript of my deposition given at the time and place aforesaid, 07-11.02, consisting of 98 pages, and that the foregoing transcript accurately states the questions asked and the aim given by me, with the changes or corrections, if any, made on the Errata Sheet attached hereto.

_____
DAVID AKEMANN

No errata sheets submitted (Please initial)
Number of errata sheets submitted (pgs.)

STATEMENT OF CHANGE OR CORRECTION
Page and Line Number_____
Reason_____

MEMORANDUM

TO: David Akemann, State's Attorney
John Barsanti, Criminal Chief

FROM: David Moore

RE: In Progress Review, open Investigations

DATE: May 15, 1998

Attached, to find a copy of the Kane County State's Attorney Investigators' Log for all investigative/non-investigative actions involving assigned investigators.

This report will be placed in the mailbox by the close of business (COB) each Friday to the addressee. The report will serve as an "informative report" to keep the State's Attorney and Criminal Chief abreast of cases which the Investigators are working.

(3)

No. 04-571

Supreme Court, U.S.
FILED
MAR 3 - 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MARY E. GORECKI,

Petitioner,

v.

PHILIP D. CARLSON and THOMAS R. SMITH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN P. DEROSE
JOHN P. DEROSE & ASSOCIATES
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Suite 428
Hinsdale, Illinois 60521
(630) 920-1111

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QUESTIONS PRESENTED FOR REVIEW

The Petition for Writ of Certiorari ("Petition") identifies the following question as that presented for review:

"Whether the legal standard for determining whether a public employee can be subjected to dismissal for political reasons, first enunciated in *Elrod* and then refined in *Branti*, is vague, uncertain and unworkable in practice, as demonstrated by the circuit conflicts, thus entitling Petitioner to qualified immunity from money damages liability."

PARTIES TO THE PROCEEDINGS

The parties are properly identified in substance in the Petition, except that Petitioner Mary E. Gorecki is no longer the Kane County State's Attorney.

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INTRODUCTION

This case involves the claim that Petitioner Mary E. Gorecki ("Petitioner" or "Gorecki") improperly terminated Respondents Philip D. Carlson and Thomas R. Smith (collectively "Respondents," individually "Carlson" and "Smith") for the exercise of their First Amendment rights. Respondents were special investigators with the Kane County State's Attorney's office. Petitioner was a candidate for the office of Kane County State's Attorney, won the election, and assumed that office. In December 2000, immediately upon taking office and as her first official act, Petitioner fired Respondents from their jobs. Respondents claim that they were fired for political reasons, namely, their endorsement of Petitioner's opponent in the election of the Kane County State's Attorney and their questioning of her ethics after discovering that Petitioner was involved in various jobs-for-favors and kickback schemes. Petitioner admits that she fired Respondents for that activity but contends that she is entitled to qualified immunity from suit because it was not "clearly established" that political affiliation was not a legitimate requirement of the special investigator position.

OPINIONS BELOW

The Petition correctly identifies the relevant opinions below from the United States Court of Appeals for the

Seventh Circuit (App. 1-9)[1] and the United States District Court for the Northern District of Illinois (App. 11-15).

JURISDICTIONAL STATEMENT

Respondents do not contest this Court's jurisdiction to consider the Petition for Writ of Certiorari. Petitioner correctly identifies the basis for this Court's exercise of jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner correctly identifies the relevant constitutional and statutory provisions involved in this case.

STATEMENT OF THE CASE

A. Lower Court Proceedings

Respondents filed a second amended complaint in the United States District Court for the Northern District of Illinois alleging a First Amendment retaliation claim

[1] Throughout Respondents' Brief in Opposition to Petition for Writ of Certiorari, the following abbreviations are used to cite to relevant materials in the record: "Pet." refers to the Petition for Writ of Certiorari; "R." refers to the numbered documents in the record on appeal in the United States Court of Appeals for the Seventh Circuit; Descriptors following "R." refer to documents or exhibits appended to the numerically identified documents in the record on appeal in the United States Court of Appeals for the Seventh Circuit; "App." refers to the page number of the Appendix to the Petition for Writ of Certiorari.

(Count I) and a state law claim for defamation (Count II) (App. 17-30). Petitioner filed a motion for summary judgment on the First Amendment claim on the basis of qualified immunity (App. 31-80). Since discovery had not yet commenced, the District Court granted Respondents' motion to take limited discovery (R. 23). Pursuant to that Order, Respondents deposed John Barsanti, the former First Assistant Kane County State's Attorney and current Kane County State's Attorney following Gorecki, (App. 196-258) and David Akemann, the former Kane County State's Attorney preceding Gorecki (App. 258-319). The Respondents then responded to Petitioner's motion for summary judgment (R. 27-29). On March 12, 2003 the District Court denied Petitioner's motion for summary judgment (App. 11-15). On June 29, 2004 the United States Court of Appeals for the Seventh Circuit affirmed the denial of Petitioner's motion for summary judgment (App. 1-9).

B. Statement of Facts

Carlson was an investigator for the Kane County State's Attorney's Office from May of 1996 to December 1, 2000 when he was terminated by the newly elected State's Attorney, Gorecki (R. 28, Ex. 2 at ¶ 2). Smith was an investigator for the Kane County State's Attorney's Office for over two years until he was similarly dismissed by Gorecki on December 1, 2000 (R. 28, Ex. 4 at ¶ 2).

During her campaign for Kane County State's Attorney, information regarding Gorecki's involvement in a kickback scheme surfaced in Kane County (R. 15 at ¶ 18). Gorecki blamed Carlson for exposing information regarding the alleged kickback scheme in which she was involved

(R. 28, Ex. 6 at 144). Gorecki blamed Smith for authoring and circulating a letter criticizing her ethics during the election (R. 28, Ex. 7 at ¶¶ 34-35). Eventually, as a result of the discovery of her unethical conduct, Gorecki was suspended from the practice of law by the Illinois Supreme Court for a period of four months. *In re Gorecki*, 802 N.E.2d 1194, 1205 (Ill. 2003). Respondents allege that their termination for those political reasons violated their First Amendment rights.

Special investigators with the Kane County State's Attorney's office, such as Respondents, were expected to perform and did perform the ministerial tasks assigned to them by the various Assistant State's Attorneys (R. 28, Ex. 3 at ¶ 6, Ex. 4 at ¶ 5). The special investigator position was responsible for performing tasks such as locating witnesses, serving subpoenas, transporting witnesses to court, and interviewing witnesses with the Assistant State's Attorneys (R. 28, Ex. 3 at ¶ 7, Ex. 4 at ¶ 6, Ex. 5 at ¶ 10). The bulk of the special investigator's duties was serving subpoenas (R. 28, Ex. 1 at 23-24).

Occasionally, special investigators took witness statements with Assistant State's Attorneys, but never developed opinions of or strategies for those witnesses (R. 28, Ex. 1 at 65-66, 75, 91). A special investigator's input into decisions about whether to charge someone would be limited to a factual report given to the Assistant State's Attorneys. Special investigators do not recommend that any particular decision be made as a result of their investigations (R. 28, Ex. 2 at 54-55). Respondents did not undertake independent investigations necessary for trial or post-trial sentencing (R. 28, Ex. 3 at ¶ 8, Ex. 4 at ¶ 7). Trial strategy was not discussed with the special investigators (R. 28, Ex. 1 at 24).

On the rare occasion when special investigators, including Respondents, were called upon to participate in an investigation, their job was limited to supporting primary police investigations by securing documents subpoenaed by Assistant State's Attorneys and delivering them to the attorney who requested them (R. 28, Ex. 3 at ¶ 9, Ex. 4 at ¶ 8, Ex. 5 at ¶ 10). Any and all investigations done by Respondents were closely supervised by an Assistant State's Attorney (R. 28, Ex. 3 at ¶ 10, Ex. 4 at ¶ 9). Special investigators, including Respondents, had minimal professional contact with the State's Attorney in their capacity as special investigators (R. 28, Ex. 3 at ¶ 11, Ex. 4 at ¶ 10, Ex. 5 at ¶ 19).

Special investigators, including Respondents, were never consulted during any policy-making conferences and did not participate, in any way, in policy decisions of the Kane County State's Attorney's Office (R. 28, Ex. 1 at 47, Ex. 2 at 21, Ex. 3 at ¶¶ 12-13, Ex. 4 at ¶¶ 11-12, Ex. 5 at ¶ 20). Before Respondents were hired, and during their employment, the Kane County State's Attorney's Office had no "litmus test" of political affiliation necessary to be a special investigator (R. 28, Ex. 3 at ¶ 14, Ex. 4 at ¶ 13, Ex. 5 at ¶ 29). Political affiliation was unimportant to and unnecessary for the tasks assigned to special investigators (R. 28, Ex. 3 at ¶ 15, Ex. 4 at ¶ 14, Ex. 5 at ¶ 29).

John Barsanti is a former First Assistant State's Attorney for Kane County and the current Kane County State's Attorney who took office immediately after Gorecki left office (R. 28, Ex. 1 at 8, 10). David Akemann was the State's Attorney for Kane County from 1992 through 2000, when Gorecki took office (R. 28, Ex. 2 at 7). Neither Barsanti nor Akemann is aware of any requirement that

State's Attorney's special investigators be of a certain political persuasion in order to hold that position (R. 28, Ex. 1 at 22, Ex. 2 at 12). Further, neither Barsanti nor Akemann found it necessary to impose the requirement of political affiliation upon their special investigators (R. 28, Ex. 1 at 34-40, Ex. 2 at 12). No witness has stated that political affiliation was necessary to perform the job of special investigator in a satisfactory manner. Neither Carlson nor Smith ever refused an assignment or to perform their duties as contrary to their political allegiance (R. 28, Ex. 1 at 50-51).

In March 2000, Gorecki challenged incumbent Kane County State's Attorney David Akemann in the Republican primary election (App. 44, 81). Respondents supported Akemann in his reelection campaign. Gorecki defeated Akemann and won the Republican nomination for Kane County State's Attorney (App. 41, 81).

During her campaign for Kane County State's Attorney, information regarding Gorecki's involvement in a kickback scheme surfaced in Kane County (R. 15 at ¶ 18). The uncovering of misconduct by Gorecki became the subject of an investigation by the Illinois Attorney Registration and Disciplinary Commission ("ARDC"). Gorecki blamed Respondents for her troubles before the ARDC regarding the jobs-for-favors and kickback schemes in which she was allegedly involved (App. 178-80; R. 28, Ex. 6 at 144). Gorecki also knew that Smith had authored and circulated a letter critical of her during the election (App. 182-83; R. 28, Ex. 7; R. 13).

In November 2000, Gorecki won the general election for Kane County State's Attorney (App. 44, 81). Gorecki

assumed the office of Kane County State's Attorney on December 1, 2000 (App. 44, 81). Carlson and Smith, investigators for over four and two years respectively, were terminated by Gorecki immediately upon her taking office (App. 45, 82; R. 28, Ex. 3 at ¶ 2, Ex. 4 at ¶ 2). For the purposes of her qualified immunity defense, Petitioner admits that she terminated Respondents for political reasons (Pet. 5 n.1; App. 34).

REASONS FOR DENYING THE WRIT

This Court should deny the Petition because it merely attempts to have this Court review the application of settled law to the facts in this case. In short, there is nothing in the Seventh Circuit's resolution of the issue of qualified immunity which warrants the exercise of this Court's appellate jurisdiction on certiorari review under the criteria specified in Supreme Court Rule 10. The Court should not exercise its judicial discretion to review the decision of the United States Court of Appeals for the Seventh Circuit.

First, as discussed in Part A below, the opinion by the Seventh Circuit does not present an important question of federal law warranting certiorari review. The Petitioner cannot identify an important question of federal law because the opinion below is consistent with the decisions of this Court, the Seventh Circuit, and other Circuit Courts of Appeals. Second, as discussed in Part B below, the approach of the various Circuit Courts to the *Elrod/Branti* standard is workable and requires some case-by-case flexibility. *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980). Third, as

discussed in Part C below, there are no other exceptional reasons for this Court to grant certiorari review of the Seventh Circuit's application of settled law to the clear facts of this case.

A. Petitioner Cannot Identify an Important Question of Federal Law Decided by the Seventh Circuit

The Seventh Circuit, in its opinion below, did not decide any new or novel questions of federal law. The decision below applied the longstanding legal standard applicable to a public official's termination of a publicly employed investigator for political reasons in violation of the First Amendment. The analysis by the Seventh Circuit is completely consistent with the decisions of this Court, the Seventh Circuit, and other Circuit Courts of Appeals. As such, the Petitioner fails to identify an important question of federal law.

Essentially, Petitioner invites this Court to settle the issue by holding that an investigator is *per se* subject to patronage dismissal, and thereby specifically overrule the Court's prior decisions in *Elrod,* 427 U.S. at 347, *Branti,* 445 U.S. at 507, *Rutan v. Republican Party of Illinois,* 497 U.S. 62 (1990), and *O'Hare Truck Service, Inc. v. City of Northlake,* 518 U.S. 712 (1996). The Court should decline Petitioner's invitation.

The legal standard governing qualified immunity has been well-defined in the decisions of this Court. The opinion below applies the established law to the facts of this case. The case does not raise any novel or "important" federal legal questions. The qualified immunity inquiry is necessarily highly fact-specific. A decision applying the

proper law, as the opinion below, presents a question limited to factually similar cases and does not warrant certiorari review.

There was a sufficient body of law established, prior to Respondents' dismissal that held that investigators, some with much more responsibility than Respondents, were not exempted from First Amendment protection. There were, to be sure, cases that held that certain employees in especially sensitive positions could be fired for political reasons. A reasonable public official would have known that an investigator in a position such as Respondents was protected by the First Amendment. The opinion below is consistent with the decisions of this Court (Part A.1), the Seventh Circuit (Part A.2), and other Circuit Courts of Appeals (Part A.3).

1. The *Elrod/Branti* Standard

In *Elrod*, this Court stated the general proposition that a public employee could not be made to suffer adverse job actions because of his or her political beliefs. The Court stated the general principle that "political beliefs and association constitute the core of those activities protected by the First Amendment." *Id.* at 356. The Court concluded that patronage, in its restraint on First Amendment freedoms, was unconstitutional. *Id.* at 372-73. *Elrod* recognized that First Amendment rights are not absolute, but may only be infringed when such infringement furthers "some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights." *Id.* at 363. Under the *Elrod* principle, the Court suggested a test of "policymaking"

or "confidential" status for determining whether particular positions were exempt from constitutional protection. *Id.* at 366-67.

In its next major decision, the Court eschewed labels like "policymaker" or "confidential employee." *Branti*, 445 U.S. at 507. *Branti* held that subjecting employees to adverse job actions for their political beliefs is allowed only if the employer can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved. *Id.* at 517-18. In short, an employee's First Amendment rights must yield to the government's interest only when the employee's political affiliation "would interfere with the discharge of public duties." *Id.* at 517. To justify a political discharge, the public employer must demonstrate that political fidelity is "essential to the discharge of the employee's governmental responsibilities." *Id.* at 518.

The cases of this Court imply that the determination of whether political affiliation is an appropriate requirement for an office involves an inquiry into the facts and some balancing of the nature of the employment position. *Branti*, 445 U.S. at 517-18; *Rutan*, 497 U.S. at 74. Although a position might accurately be classified as "high-level," a court must inquire into the nature of the position in order to determine whether political affiliation is a necessary job requirement. *Branti*, 445 U.S. at 518; *see also* Note, *Do Not Go Gentle Into That Good Night: The Unquiet Death of Political Patronage*, 1992 WIS. L. REV. 511, 540-41 (1992). The Court subsequently observed that "the inquiry is whether the affiliation requirement is a reasonable one, so it is inevitable that some case-by-case adjudication will be required even where political affiliation

is the test the government has imposed." *O'Hare Truck Serv., Inc.*, 518 U.S. at 719.

For the purposes of qualified immunity, a determination of whether a particular employee's constitutional right to be free from patronage dismissal was "clearly established" at the time of the alleged violation necessarily entails an examination of factually similar cases. *See Anderson v. Creighton*, 483 U.S. 635, 638-40 (1987). This Court has emphasized that the qualified immunity inquiry "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Id.* at 639. After recognizing the dangers inherent in defining the legal right too generally, the Court summarized its cases as establishing "that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640.

2. Consistent Application of the *Elrod/Branti* Standard by the Seventh Circuit

The Seventh Circuit has consistently applied the *Elrod/Branti* standard as articulated by this Court, and continued its consistent application in the opinion below: "The ultimate inquiry, however, is not a search for whether the job fits the appropriate label 'policymaker' or 'confidential,' but whether party affiliation is an appropriate requirement for performing the job." *Carlson v. Gorecki*, 374 F.3d 461, 464 (7th Cir. 2004) (citing *Thompson v. Illinois Dept. of Prof'l Regulation*, 300 F.3d 750, 755-56 (7th Cir. 2002)).

Following the suggestion of this Court, the Seventh Circuit established a functional test to facilitate its case-by-case balancing and determine whether public employers may constitutionally make party affiliation a job requirement. The test is whether the power inherent in any given office or position authorizes the employee to provide, "either directly or indirectly, meaningful input into government decision making where there is room for principled disagreement on goals or their implementation." *Hudson v. Burke*, 913 F.2d 427, 431 (7th Cir. 1990) (quoting *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981)).

Identifying the "inherent" power of the job usually involves looking at the historical treatment of that position and, in certain cases, the work performed by the people who hold the position. *See, e.g.*, *Hudson*, 913 F.2d at 433 (evidence regarding work performed by legislative investigators considered); *Flenner v. Sheahan*, 107 F.3d 459, 465 (7th Cir. 1997) (factual record necessary to ascertain the level of autonomy or discretion in the position at issue). The Seventh Circuit has consistently applied this approach, noting that "[f]lexibility may be admirable, but when a public agency decides to match duties to personal skills and interests, rather than to job titles, it also surrenders the benefits of certainty in the *Elrod/Branti* inquiry. What the employee does becomes important." *Hernandez v. O'Malley*, 98 F.3d 293, 296 (7th Cir. 1996).

The only case from the Seventh Circuit that has found that any kind of investigator is subject to patronage dismissal is *Hudson*, but the employees in that case were interchangeably called "investigators" and "legislative aides." 913 F.2d at 429, 433. *Hudson* involved partisan employees who worked for the politically influential city

finance committee. *Id.* at 432. The court found that given the political nature of the finance committee and the investigators' subjective input into policy decisions, the *Hudson* employees, rather than being investigators, were more akin to "legislative aides" who routinely forged policy and tactics for the committee. *Id.* Although the employees attempted to analogize their duties to that of "investigators" who were not exempt from the constitutional protections, the court found that their positions were politically influential and subject to patronage dismissal. *Id.* at 433-34. In short, *Hudson* did not determine that public employees performing the job functions of investigators were exempt from First Amendment protection.

One year later, the Seventh Circuit addressed the question, left unanswered by *Hudson*, of whether employees performing the functions of investigators could be subject to dismissal for political reasons. *Matlock v. Barnes*, 932 F.2d 658, 662 (7th Cir. 1991). In *Matlock*, the Seventh Circuit held that an investigator with the City of Chicago's law department enjoyed First Amendment protection. *Id.* at 662-63. The investigator had supported the political rival of his superior. The court held that the investigator's duties which included accepting case assignments from the attorneys in his department, investigating claims by visiting accident sites, interviewing witnesses, taking pictures, and preparing written recommendations for the attorneys, which they often adopted but were free to ignore, did not require political fidelity. *Id.* at 663-64. The court noted that the investigator did not have authority to settle cases and did not supervise anyone. *Id.* at 664. The court found that "Matlock seem[ed] not to have had as much responsibility as other law

enforcement personnel deemed by courts to be policymakers." *Id.*

The Seventh Circuit's decision in *Hernandez* is of little significance to whether the law was "clearly established" that investigators were not exempt from First Amendment protection and, thus, subject to patronage dismissal. *Hernandez* involved a state's attorney's discharge of a court stenographer, not an investigator. 98 F.3d at 294-95. Indeed, the Seventh Circuit held that the stenographer position in *Hernandez* was somewhere between the investigator position in *Matlock* and the legislative aide position in *Hudson*. *Id.* at 296. Although the law was "clearly established" with regard to the rights of investigators and legislative aides, it had not yet been "clearly established" with regard to the rights of court stenographers. *Id.* at 296-97. That the law was not "clearly established" with regard to the rights of court stenographers is of no consequence to the determination of whether the rights of investigators was "clearly established."

Petitioner attempts to confuse the issue by citing Seventh Circuit cases involving employment positions generally similar to investigators. However, the Seventh Circuit noted that "[t]he test for whether the law was clearly established must be conducted based on the specific facts of the case, and not a high level of generality." *Carlson*, 374 F.3d 461, 466 (citing *Greenberg v. Kmetko*, 922 F.2d 382, 383-84 (7th Cir. 1991)); *see also Anderson*, 483 U.S. at 639-40. Under the law of the Seventh Circuit, it was clearly established that investigators, specifically, are entitled to First Amendment protection. *See Matlock*, 932 F.2d at 662; *Carlson*, 374 F.3d at 466 (noting that "this case is remarkably analogous to *Matlock*"). Even if one considered the investigators to be police officers, the

Seventh Circuit has held that, except for certain deputies with legitimate policymaking authority, police officers maintain their right to speak out without fear of losing their jobs. *See, e.g., Lickiss v. Drexler*, 141 F.3d 1220 (7th Cir. 1998). Under the law of the Seventh Circuit, a reasonable public official should have known that investigators, such as Respondents, are not exempt from First Amendment protection.

Contrary to the assertion of Petitioner, the Seventh Circuit has not wavered in its application of the *Branti* standard more generally (App. 17). The Seventh Circuit has consistently held that the duties of the position at issue are determinative, not the actual functions performed by those who hold the position. *Carlson*, 274 F.3d at 465; *Tomczak v. City of Chicago*, 765 F.2d 633, 641-42 (7th Cir. 1985). In the opinion below, the inherent nature of the job remains determinative, while "the historical treatment of the job and to the work performed by those who presently hold the position" are merely relevant in discerning the inherent nature of the position. *Carlson*, 274 F.3d at 465. *Carlson* is completely consistent with *Tomczak*.

The above discussion demonstrates that the Seventh Circuit has consistently applied the *Elrod/Branti* standard to similar public employment positions. Accordingly, there is no meaningful intra-circuit conflict over whether investigators are entitled to First Amendment protection from patronage dismissals. After *Matlock*, a reasonable public official should have known that it is impermissible to take adverse employment action against special investigators for political reasons.

3. Consistent Application of *Elrod/Branti* Standard by the Circuit Courts

Petitioner attempts to identify an inter-circuit conflict over whether special investigators could be fired for political reasons. However, contrary to Petitioner's assertion, no Circuit Court has held that an investigator is exempt from First Amendment protection under the *Elrod/Branti* line of cases. Two Courts of Appeals, the Second and Fifth Circuits, have extended qualified immunity to the termination of investigators, but only because the state of the law was not "clearly established" at the time the adverse action was taken against them. *See Danahy v. Buscaglia*, 134 F.3d 1185 (2d Cir. 1998); *Gunaca v. Texas*, 65 F.3d 467 (5th Cir. 1995). In her analysis, Petitioner conflates the issue of whether a publicly employed investigator is entitled to First Amendment protection from patronage dismissal with the issue of whether the law was "clearly established" on that point. Regardless of whether an employee enjoys First Amendment protection from politically motivated employment adverse action, the public employer is entitled to qualified immunity if that right is not "clearly established" at the time of the action. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982).

The First Amendment and qualified immunity questions are analytically distinct insofar as the fact that one court's determination that an employee's First Amendment rights were not "clearly established" at one point in time does not foreclose the possibility that those rights will, sometime later, become "clearly established." In other words, under the qualified immunity analysis, simply because a court held, on some past occasion, that an employee's First Amendment rights were not *a priori* "clearly established" does not mean that similar employees' constitutional rights cannot

be recognized as "clearly established" in any future case. Petitioner urges this Court to effectively freeze the constitutional rights of investigators in some pre-*Elrod/Branti* state, through the grant of qualified immunity, simply because some courts have refused to recognize, at some past time, their constitutional rights as "clearly established" retroactively. As such, the decisions in *Gunaca* and *Dunahy* are not in actual conflict with the opinion below.

In *Gunaca*, the Fifth Circuit considered whether a newly elected county district attorney who dismissed an investigator for supporting the former district attorney violated the employee's First Amendment rights. 65 F.3d at 473. The Fifth Circuit acknowledged that the investigator had sufficiently alleged that the termination violated his constitutional rights, but proceeded to consider whether those rights were "clearly established" at the time of the termination. *Id.* at 473-74. In that case, the investigator "did not address the *Branti* exception . . . , nor did he provide . . . evidence that would have supported a claim that the position of investigator does not fall under the exception." *Id.* at 474 n.6. The Fifth Circuit found that, by January 1993, "neither the Fifth Circuit nor the Supreme Court had addressed the issue of political patronage in the hiring or firing of investigators in district attorneys' offices. . . ." *Id.* at 475. However, *Gunaca* does not automatically entitle district attorneys to qualified immunity in all future cases involving investigators, especially where the investigator employees can produce evidence that the position does not fall under the *Elrod/Branti* exception. It simply does not follow that qualified immunity for termination of an investigator in January 1993, without evidence that the position was outside the *Branti* exception, translates into qualified immunity for termination of an

investigator in December 2000 with strong evidence that the position falls outside the *Elrod/Branti* exception.

The Second Circuit's decision in *Danahy* involved employees who were appointed to "investigate and prosecute charges of Medicaid fraud" as a part of a "statewide prosecutor's office designed to root out complex fraudulent schemes." 134 F.3d at 1191. A newly elected Attorney General dismissed a number of employees in the Medicaid Fraud Control Unit upon taking office in January 1995. In *Danahy*, the employees all "dealt with highly confidential matters pertaining to the exercise of prosecutorial discretion as well as investigating, auditing and case preparation duties." *Id.* The Second Circuit found that a large portion of the employees' jobs involved the execution of prosecutorial functions. *Id.* at 1191-92. In light of the employees' job responsibilities, the Second Circuit, relying on cases holding that prosecutors were not protected from dismissal for political reasons, found that the public employer was entitled to qualified immunity. *Id.* at 1192-93. However, no Second Circuit case has addressed whether it was "clearly established" that employees with duties of a ministerial investigator, without prosecutorial responsibilities, would be entitled to First Amendment protection from patronage dismissal.

As Petitioner recognizes, the opinion below is consistent, in a particularized sense, with decisions in the Sixth and Tenth Circuits. *See Bauer v. Montgomery,* 215 F.3d 656 (6th Cir. 2000); *Laidley v. McClain*, 914 F.2d 1386 (10th Cir. 1990). In each of those cases, the public employees performed duties consistent with that of a low-level investigator. *Bauer*, 215 F.3d at 661 (performed background investigations, corresponded with law enforcement officials, and interviewed witnesses); *Laidley*, 914 F.2d at

1392 (located individuals, served process, sent letters, interviewed clients, and answered telephones). Accordingly, as demonstrated by *Matlock*, *Bauer*, and *Laidley*, the First Amendment rights of low-level investigators to be free from patronage dismissal was "'clearly established' in a more particularized, and hence more relevant sense" than the more generalized circumstances in *Gunaca* and *Danahy*. *Anderson*, 483 U.S. at 640. Finally, it is not necessary that this Court have previously decided the narrow issue of the First Amendment rights of investigators for Petitioner to be given fair warning that her conduct violated the Respondents "clearly established" rights. *See Elder v. Holloway*, 510 U.S. 510, 516 (1994) (Courts of Appeals decisions are "relevant authority" in determining if there is qualified immunity.).

Further, the opinion below is clearly consistent with the "clearly established" law of the Third, Sixth, and Ninth Circuits. *See DiRuzza v. County of Tehama*, 206 F.3d 1304, 1310-14 (9th Cir. 2000); *Hall v. Tollett*, 128 F.3d 418, 429 (6th Cir. 1997); *Burns v. County of Cambria*, 971 F.2d 1015, 1022 (3d Cir. 1992). The Third Circuit held that political affiliation was not an appropriate job requirement for a sheriff's department employee who was responsible for serving process, transporting prisoners, and securing courtrooms. *Burns*, 871 F.3d at 1022-23. Similarly, the Sixth Circuit found that political affiliation was not an appropriate job requirement for a rank-and-file sheriff's department employee. *Hall*, 128 F.3d at 429. On facts very close to *Burns* and *Hall*, the Ninth Circuit found that summary judgment for the defendant was not appropriate when there was little to support the proposition that political fidelity was necessary to the sheriff's deputy position. *DiRuzza*, 206 F.3d at 1309-11. *DiRuzza* explained

that decisions of other Circuits, holding that similarly titled positions were subject to dismissal, were consistent with its decision because of the difference between the nature of the positions. *Id.* at 1311-12. The weight of the decisions of the Circuit Courts gave Petitioner clear warning that her actions violated the "clearly established" rights of Respondents.

Even assuming *arguendo* the law was not completely settled between the various Circuit Courts with regard to whether investigators are entitled to First Amendment protection from patronage dismissal; this does not automatically entitle Petitioner to qualified immunity. The agreement among the Circuits is that it is "clearly established" that low-level, ministerial investigators, such as Respondents, are entitled to First Amendment protection from patronage dismissal. Moreover, Petitioner was not a multi-circuit actor, she performed all of her functions as prosecutor within Kane County, Illinois and the Seventh Circuit; Gorecki should not be entitled to qualified immunity by manufacturing superficial conflicts among the various Circuit Courts. In short, the decisions of this Court and the various Circuit Courts of Appeals represent the only law on which Petitioner could have reasonably relied in making her decision to terminate Respondents. It was "clearly established" in December 2000, under those decisions, that Petitioner's actions violated the rights of Respondents.

B. The *Elrod/Branti* Standard is Workable in Practice

Next, Petitioner engages in a lengthy, and largely irrelevant, dissertation on the inherent vagueness of the

Elrod/Branti formulation. In her survey of the decisions of the various Circuit Courts, Petitioner again attempts to manufacture a split between the Circuits by differentiating their approaches to determining whether a public position affords an employee First Amendment protection from dismissal for political reasons. Regardless of whether the various Circuits examine slightly different factors in their implementation of the *Elrod/Branti* standard, the law was "clearly established," under *Elrod/Branti*, that Petitioner could not dismiss a low-level employee, such as Respondents, for activities protected by the First Amendment.

Following *Elrod* and *Branti*, the Circuit Courts have employed remarkably similar approaches to determine whether political affiliation is a necessary requirement for the public employee's position. In order to determine whether political affiliation is a necessary requirement for the position at issue, each of the Circuits looks to the inherent nature of the position as the determinative factor. Although the inherent nature of the position remains determinative, the Circuits sometimes consider the actual duties performed by the position as relevant evidence. While none of the Circuits have adopted *per se* rules based on job title, the Circuits have developed a uniform approach to determining which positions are protected by the First Amendment based on the nature of the position at issue. Each of the Circuits considers the actual duties performed by the position relevant to the ultimate question of the nature of the position.

The First Circuit has held that, "absent ambiguity in the official job description, the analysis [of whether political affiliation is an appropriate requirement for effective performance] must focus upon the 'powers inherent in a

given office, as opposed to the functions performed by a particular occupant of that office.'" *O'Connor v. Steeves*, 994 F.2d 905, 911 (1st Cir. 1993) (quoting *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 242 (1st Cir. 1986)). Although the First Circuit's analysis focuses on the inherent nature of the position, this will not bar evidence of the actual duties performed when necessary to resolve ambiguities in the job description. *Id.*

In order to determine whether political affiliation is necessary to the job position, the Second Circuit attempts to discern the duties inherent in the position. *Gordon v. County of Rockland*, 110 F.3d 886, 888 (2d Cir. 1997). However, the fact that the inherent duties of the position control does not mean that the duties performed by an employee may not be considered in that determination. *Id.* (citing *Regan v. Boogertman*, 984 F.2d 577, 580 (2d Cir. 1993) ("[W]e do not merely look at her actions taken while in office. Rather, we also look at the power with which she is vested by law, and which is inherent in the office.")).

Courts in the Third Circuit "are also advised to look to the 'function[s] of the office in question and not the actual past duties of the particular employee involved.'" *Boyle v. County of Allegheny*, 139 F.3d 386, 397 (3d Cir. 1998) (quoting *Peters v. Delaware River Port Auth.*, 16 F.3d 1346, 1349 (3d Cir. 1994) and citing *O'Connor*, 994 F.2d at 911). As the other Circuits have recognized, the Third Circuit acknowledges that, "[a]lthough actual past duties are not determinative, they may be informative." *Id.* (citation omitted).

The Fourth Circuit examines the particular responsibilities of the public employee's position in order to determine if political affiliation is necessary to that position.

Knight v. Vernon, 214 F.3d 544, 549 (4th Cir. 2000) ("specific duties of the public employee's position govern whether political allegiance to her employer is an appropriate job requirement") (explaining *Jenkins v. Medford*, 119 F.3d 1156, 1165 (4th Cir. 1997)). As with other Circuits, the Fourth Circuit considered the plaintiff's job duties relevant to this ultimate determination. *Id.* at 549-50.

As with the other Courts of Appeals, the Fifth Circuit determines whether the inherent nature of the aggrieved employee's position requires a certain political affiliation for effective performance. *Gentry v. Lowndes County*, 337 F.3d 481, 487-88 (5th Cir. 2003) (citing *Hoard v. Sizemore*, 198 F.3d 205, 213-14 (6th Cir. 1999)). The Fifth Circuit has considered the actual duties performed by officeholders as relevant to this analysis. *Id.*; *Wiggins v. Lowndes County*, 363 F.3d 387, 390-91 (5th Cir. 2004) (contrasting the actual duties performed by a Road Foreman with the duties performed by the Road Manager in *Gentry*).

The Sixth Circuit holds that political affiliation is a necessary job requirement where the position at issue is inherently political in nature. *Faughender v. City of North Olmstead*, 927 F.2d 909, 913 (6th Cir. 1991). However, the Sixth Circuit requires courts to "look beyond the mere job title and examine the actual duties of the specific position." *Hall v. Tollett*, 128 F.3d 418, 423 (6th Cir. 1997). While the Sixth Circuit identified categories of positions that are inherently political, the actual duties performed by employees in the position may be relevant to a determination of whether a position falls into one of those categories when the inherent nature of the position is unclear. *McCloud v. Testa*, 97 F.3d 1536, 1560-62 (6th Cir. 1996).

As illustrated by the opinion below, the Seventh Circuit merely stated that it looks "to the historical treatment of the job and to the work performed by those who presently hold the position to determine the inherent nature of the job." *Carlson*, 274 F.3d at 465. This approach is consistent with *Branti* and the cases of other Circuits.

The Eighth Circuit, citing the First Circuit's opinion in *O'Connor*, has also considered the actual duties performed relevant, but not determinative, to whether political affiliation is an appropriate requirement for the position. *Johnson v. City of West Memphis*, 113 F.3d 842 (8th Cir. 1997). The inherent nature of the position still controls the outcome. *Id.*

The Ninth Circuit examines several factors, in conjunction with the duties actually performed, to determine whether political affiliation could be a requirement for the position at issue. *DiRuzza*, 206 F.3d at 1310. Although the Ninth Circuit states that "[t]he critical inquiry is the job actually performed," the factors considered by the Ninth Circuit are more akin to those evaluated by the other Circuits in determining the inherent nature of the position. *Compare Fazio v. County of San Francisco*, 125 F.3d 1328, 1334 n.5 (9th Cir. 1997) ("vague or broad responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders"), *with Jimenez Fuentes*, 807 F.3d at 242.

In order to determine whether political affiliation is necessary to the position, the Tenth Circuit analyzes "the inherent powers of the positions and the actual duties

performed." *Jantzen v. Hawkins*, 188 F.3d 1247, 1253 (10th Cir. 1999). However, the public employer ultimately bears the burden of proving "whether political association was an appropriate requirement for the effective performance of the public *office* involved." *Id.* (emphasis added). Thus, the actual duties performed are relevant, but not necessarily dispositive, in a *Branti* inquiry.

The Eleventh Circuit has similarly held that "[t]he inherent powers and actual job responsibilities of the position involved, and the relationship of the particular position to the elected official, should be part of the analysis." *Parrish v. Nikolits*, 86 F.3d 1088, 1093 (11th Cir. 1996).

Finally, petitioner attempts to shoehorn an additional issue for review into her Petition by attempting to identify divergent approaches among the Circuits in determining whether to apply the *Connick/Pickering* test or the *Elrod/Branti* standard. *Connick v. Meyers*, 461 U.S. 138 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). However, this Court has already considered a patronage case involving retaliation based on intermixed political expression and political affiliation. *O'Hare Truck Serv.*, 518 U.S. at 714-15; *see also* Lohr, *Employer's Motivations: The Framework for Analyzing First Amendment Rights of Political Acivity in* O'Hare, 8 GEO. MASON U. CIV. RTS. L. J. 65, 75 (1997-98). In light of this Court's decision in *O'Hare Truck Service*, there is no real dispute over this issue. 518 U.S. at 719-20. As the Court explained in *O'Hare*,

> [a] reasonableness analysis will also accommodate those many cases, perhaps including the one before us, where specific instances of the employee's speech or expression, which require balancing in the *Pickering* context, are intermixed

> with a political affiliation requirement. In those cases, the balancing *Pickering* mandates will be inevitable. This case-by-case process will allow the courts to consider the necessity of according to the government the discretion it requires in . . . the delivery of governmental services.

Id. The cases that Petitioner cites for the proposition that the Seventh Circuit decides political speech cases solely under *Elrod/Branti*, as an exception to the *Connick/Pickering* test, were decided before *O'Hare Truck Service* (App. 22). *See Warzon v. Drew*, 60 F.3d 1234, 1238 (7th Cir. 1995); *Wilbur v. Mahan*, 3 F.3d 214, 215 (7th Cir. 1993). Further, Petitioner's actions violated the "clearly established" rights of Respondents under either the *Connick/Pickering* test or the *Elrod/Branti* standard and this argument is of no consequence to the outcome of this case. In any event, in this case, the lower courts have not had the opportunity to consider whether *Connick/Pickering* balancing is necessary and apply that standard. Instead, Petitioner moved for summary judgment on the immediately fatal issue of qualified immunity – that it was not "clearly established" that political affiliation was not a necessary requirement for the job of special investigator. After further discovery, the lower courts may, in fact, determine that the *Connick/Pickering* balancing applies. This issue is not ripe for this Court's consideration.

C. There Are No Exceptional Circumstances Warranting Certiorari Review

As discussed above, there is no important issue of federal law to be settled by this Court. Further, the principles of *stare decisis* weigh heavily against overruling the *Elrod/Branti* line of cases and the balancing they require.

The principles of *stare decisis* caution against adoption of a *per se* rule that certain public employees, namely investigators, are subject to patronage dismissal under the First Amendment. The Seventh Circuit has applied well-settled qualified immunity principles to the particular facts of this case. Further, the reasoning and result reached by the Seventh Circuit were correct and just, making it unnecessary for this Court to intervene to correct an injustice. As the Court clearly states in Rule 10, a petition for certiorari is "rarely granted." Under these circumstances, Petitioner has not shown that there is any exceptional element that justifies review.

CONCLUSION

For the foregoing reasons, Respondents Philip D. Carlson and Thomas R. Smith respectfully request that this Court deny the Petition for a *Writ of Certiorari* to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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